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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC., *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Energy Policy Act of 1992, 42 U.S.C. § 2297, *et seq.* ("EPACT"), requires domestic utilities to make annual payments of $150 million to a government-administered fund through 2007. In 1998, petitioners brought an action against the United States in the Southern District of New York ("District Court") seeking declaratory and injunctive relief to abate their ongoing payment obligations on the grounds that EPACT violates the Takings and Due Process Clauses of the Fifth Amendment. On appeal from the District Court's order affirming its own jurisdiction, the Court of Appeals for the Federal Circuit ("Federal Circuit") held that the District Court lacked subject matter jurisdiction over petitioners' claims and ordered that they be transferred to the Court of Federal Claims ("CFC").

The questions presented are:

1. Whether the Federal Circuit's abrogation of this Court's decision in *Bowen v. Massachusetts*, 487 U.S. 879 (1988), should be permitted to stand and, contrary to this Court's decision in *Eastern Enterprises, Inc. v. Apfel*, 524 U.S. 498 (1998), the District Court deprived of subject matter jurisdiction to hear petitioners' Fifth Amendment challenges to EPACT and claims for prospective, equitable relief.

2. Whether, contrary to this Court's precedent and decisions of other circuit courts of appeals, the CFC can render judgment on petitioners' Takings and Due Process Clause challenges to EPACT and provide an "adequate remedy" under 5 U.S.C. § 704 for their equitable claims, thereby depriving the District Court of its subject matter jurisdiction over this case.

PARTIES TO THE PROCEEDING

The following utilities in *Consolidated Edison Co. of New York, Inc., et al. v. United States, et al.*, No. 99-1464 (Fed. Cir.) are parties to this proceeding:

1. Consolidated Edison Company of New York, Inc.
2. New York Power Authority
3. Niagara Mohawk Power Corporation
4. Rochester Gas and Electric Corporation
5. Arizona Public Service Corporation
6. Commonwealth Edison Company
7. Duke Energy Corporation
8. Entergy Gulf States, Inc.
9. Florida Power Corporation
10. Florida Power and Light Company
11. GPU Nuclear, Inc. (on behalf of Jersey Central Power & Light Company, Metropolitan Edison Company, and Pennsylvania Electric Company)
12. Indiana Michigan Power Company
13. Nebraska Public Power District
14. PECO Energy Company

15. Southern California Edison Company

16. Southern Nuclear Operating Company, Inc.

17. System Fuels, Inc.

18. Texas Utilities Electric Company (now TXU Electric Company)

19. Virginia Electric & Power Company

20. Washington Public Power Supply System (now Energy Northwest)

21. Wisconsin Public Service Corporation

22. Wolf Creek Nuclear Operating Corporation (on behalf of Kansas City Power & Light Company, Kansas Electric Power Cooperative, Inc., and Kansas Gas and Electric Company)

CORPORATE DISCLOSURE STATEMENT

The parent corporations and any publicly held companies that own 10 percent or more of the stock of each nongovernmental corporation filing this petition are as follows:

1. *Consolidated Edison Company of New York, Inc.*

   Consolidated Edison, Inc. is the parent company of Consolidated Edison Company of New York, Inc. and has issued shares to the public. No other publicly held company owns 10 percent or more of its stock.

2. *New York Power Authority*

   New York Power Authority has no parent corporation or other publicly held company that owns 10 percent or more of its stock.

3. *Niagara Mohawk Power Corporation*

   Niagara Mohawk Holdings, Inc. is the parent corporation of Niagara Mohawk Power Corporation. No other publicly held company owns 10 percent or more of its stock.

4. *Rochester Gas and Electric Corporation*

   RGS Energy Group, Inc. is the parent corporation of Rochester Gas and Electric Corporation. No other publicly held company owns 10 percent or more of its stock.

5. *Arizona Public Service Company*

Pinnacle West Capital Corporation is the parent corporation of Arizona Public Service Company. No other publicly held company owns 10 percent or more of its stock.

6. *Commonwealth Edison Company*

Exelon Corporation is the parent corporation of Commonwealth Edison Company. No other publicly held company owns 10 percent or more of its stock.

7. *Duke Energy Corporation*

Duke Energy Corporation has no parent corporation or other publicly held company that owns 10 percent or more of its stock.

8. *Entergy Gulf States, Inc.*

Entergy Corporation is the parent corporation of Entergy Gulf States, Inc. No other publicly held company owns 10 percent or more of its stock.

9. *Florida Power Corporation*

Progress Energy Corporation is the parent corporation of Florida Power Corporation. No other publicly held company owns 10 percent or more of its stock.

10. *Florida Power and Light Company*

FPL Group, Inc. is the parent corporation of Florida Power and Light Company. No other publicly held company owns 10 percent or more of its stock.

11. *GPU Nuclear, Inc.* (on behalf of Jersey Central Power & Light Company, Metropolitan Edison Company, and Pennsylvania Electric Company)

    GPU, Inc. is the parent corporation of GPU Nuclear, Inc. No other publicly held company owns 10 percent or more of its stock.

12. *Indiana Michigan Power Company*

    American Electric Power Company, Inc. is the parent corporation of Indiana Michigan Power Company. No other publicly held company owns 10 percent or more of its stock.

13. *Nebraska Public Power District*

    Nebraska Public Power District is a public corporation and political subdivision of the State of Nebraska, is not authorized to issue stock, and has no stock issued or outstanding. Accordingly, Nebraska Public Power District has no parent corporation or other publicly held company that owns 10 percent or more of its stock.

14. *PECO Energy Company*

    Exelon Corporation is the parent corporation of PECO Energy Company. No other publicly held company owns 10 percent or more of its stock.

15. *Southern California Edison Company*

    Edison International is the parent corporation of Southern California Edison Company. No other publicly held company owns 10 percent or more of its stock.

16. *Southern Nuclear Operating Company, Inc.*

The Southern Company is the parent corporation of Southern Nuclear Operating Company, Inc. No other publicly held company owns 10 percent or more of its stock.

17. *System Fuels, Inc.*

Entergy Corporation is the parent company of Entergy Arkansas, Inc., Entergy Louisiana, Inc., Entergy Mississippi, Inc. and Entergy New Orleans, Inc., each of which are the parent corporations of System Fuels, Inc. No other publicly held company owns 10 percent or more of its stock.

18. *Texas Utilities Electric Company*

TXU Corp. is the parent corporation of Texas Utilities Electric Company, now TXU Electric Company. No other publicly held company owns 10 percent or more of its stock.

19. *Virginia Electric & Power Company*

Dominion Resources, Inc. is the parent corporation of Virginia Electric & Power Company. No other publicly held company owns 10 percent or more of its stock.

20. *Washington Public Power Supply System*

Washington Public Power Supply System, now Energy Northwest, has no parent corporation or other publicly held company that owns 10 percent or more of its stock.

21. *Wisconsin Public Service Corporation*

WPS Resources is the parent corporation of Wisconsin Public Service Corporation. No other publicly held company owns 10 percent or more of its stock.

22. *Wolf Creek Nuclear Operating Corporation* (on behalf of Kansas City Power & Light Company, Kansas Electric Power Cooperative, Inc., and Kansas Gas and Electric Company)

Western Resources, Inc. is the parent corporation of Kansas Gas & Electric Company which in turn is the parent corporation of Wolf Creek Nuclear Operating Corporation. No other publicly held company owns 10 percent or more of its stock.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit issued pursuant to the Federal Circuit's *en banc* order in this case.

OPINIONS AND ORDERS BELOW

The opinion and order of the District Court (Knapp, S.D.J.) denying the Government's motion to dismiss or alternatively to transfer this action to the CFC (Appendix ("Pet. App.") 48a-59a) is published at 45 F. Supp. 2d 331 (S.D.N.Y. 1999). The Federal Circuit's initial decision (Rader, C.J., joined by Plager, C.J.; Gajarsa, C.J., dissenting) affirming the District Court (Pet. App. 19a-47a) is published at 234 F.3d 642 (Fed. Cir. 2000). The *en banc* order of the Federal Circuit granting rehearing, rehearing *en banc*, and directing the panel to issue a revised opinion, and the panel's decision implementing that order, dated May 3, 2001 (Pet. App. 1a-18a) are published at 247 F.3d 1378 (Fed. Cir. 2001). The Federal Circuit's June 7, 2001, order staying the mandate (Gajarsa, C.J., dissenting) (Pet. App. 60a-65a) is not published.

STATEMENT OF JURISDICTION

The Federal Circuit entered its *en banc* order and revised opinion on May 3, 2001. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

The following constitutional provisions, statutes and regulations involved in this case are reprinted in the Appendix at 66a-77a: United States Constitution, Amendment V; 5 U.S.C. §§ 702, 704; 28 U.S.C. §§ 1292(d)(4)(A), (B); 28 U.S.C. § 1331; 28 U.S.C. § 1491; 28 U.S.C. § 1631; 42 U.S.C. §§ 2297g, 2297g-1 and 10 C.F.R. §§ 766.103, 766.106.

STATEMENT OF THE CASE

Petitioners are domestic utilities required by EPACT to pay billions of dollars to a fund created to finance cleanup of uranium processing plants owned and operated by the Government. In 1998, petitioners brought an action against the Government in the District Court challenging the constitutionality of EPACT on Takings and Due Process grounds and seeking declaratory and injunctive relief to void their future payment obligations.[1] Each of the petitioners also brought actions in the CFC initially based on contract to recover their past payments to the fund. The District Court held that it had subject matter jurisdiction over petitioners' claims under 28 U.S.C. § 1331, and that the Government had waived its sovereign immunity to suit under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, *et seq*. On interlocutory appeal pursuant to 28 U.S.C. § 1292(d)(4)(A), the Federal Circuit reversed, holding that a CFC judgment refunding petitioners' past payments would be an entirely adequate remedy for their constitutional challenges to EPACT's ongoing payment obligations and requests for declaratory and injunctive relief.

The Federal Circuit's decision merits review because it conflicts with decisions of this Court and other circuit courts of appeals firmly establishing the jurisdiction of district courts to determine the constitutionality of federal statutes and afford appropriate declaratory and injunctive relief. By depriving the district court of authority under the APA and conversely expanding the powers of the CFC, the Federal Circuit's decision represents a wholesale realignment of the jurisdiction of these courts and creates substantial confusion

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1. Defendants in the District Court are the United States of America, the United States Department of Energy, individually and as successor to the United States Atomic Energy Commission and the Energy Research and Development Administration (collectively, the "Government").

as to the proper forum for constitutional challenges to federal statutes that seek prospective, equitable relief. Moreover, because the Federal Circuit's decision sets a rule to govern litigation against the Government in district courts nationwide, *see* 28 U.S.C. § 1292(d)(4)(A), it will present recurring problems of constitutional significance absent this Court's plenary review.

A. *Background*

Petitioners are twenty-two domestic utilities that own and/or operate (or previously owned and/or operated) nuclear reactors for the purpose of generating electricity. To fuel their reactors, petitioners need uranium processed in a manner that causes it to become "enriched." For many decades, petitioners purchased uranium enrichment services from the Government pursuant to fixed price contracts and a federal statute, 42 U.S.C. § 2201v, which required the Government to set its prices at levels sufficient to recover all of its costs.[2]

In 1992, Congress enacted the Energy Policy Act of 1992 ("EPACT"). *See* 42 U.S.C. § 2297, *et seq.* EPACT requires domestic utilities that purchased enrichment services from the Government between 1945 and 1992 to pay $2.25 billion into a fund established to defray the cost of decontaminating and decommissioning the Government's uranium enrichment plants.[3] *See* 42 U.S.C. § 2297g-1, *et seq.*; 10 C.F.R. § 766.1,

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2. During the 1940s and 1950s, the Government constructed several uranium enrichment processing facilities that it used for purposes of national defense. In 1969, the Government began selling its enrichment services to private parties. *See generally* 42 U.S.C. § 2201, *et seq.*

3. Decontamination and decommissioning ("D&D") refer to the process of removing a nuclear facility from service at the end of its useful life and reducing the remaining radioactivity at the site to acceptable levels.

et seq. The Decontamination and Decommissioning Fund ("D&D Fund") was created to relieve the Government of its anticipated D&D liability in order to aid efforts to privatize the Government's enrichment business. *See generally* H.R. Rep. No. 102-474, Part 2, *reprinted in,* 1992 U.S.C.C.A.N., 102nd Cong. 2064 (1992).

EPACT authorizes the Government to collect this money from the utilities in annual assessments of $150 million per year, for a period of 15 years, from 1993 through 2007. 42 U.S.C. §§ 2297g-1(c), (d), (e). The amount each utility must pay into the D&D Fund is based on the quantity of enrichment services purchased between 1945 and October 23, 1992, adjusted annually for inflation, 42 U.S.C. § 2297g-1(c), and is reflected in an invoice sent by the Government in October of each year. 10 C.F.R. § 766.103. If these invoices are not paid within 30 days, late fees and interest penalties are assessed. 10 C.F.R. § 766.106. In 2007, the Government is to report to Congress with recommendations for reauthorization of the program and the D&D Fund. 42 U.S.C. § 2297g-4.

In 1998, petitioners commenced the instant action in the District Court seeking declaratory and injunctive relief on the grounds that EPACT violates the Takings and Due Process Clauses of the Fifth Amendment and unconstitutionally impairs their contractual rights. Relying on this Court's decision in *Eastern Enterprises, Inc. v. Apfel*, 524 U.S. 498 (1998), which held that a similar statute requiring payments to a government-created fund violated the Fifth Amendment, petitioners allege that EPACT unfairly and unreasonably imposes severely retroactive liability upon a limited class that had no responsibility for operating the Government's enrichment plants and no reasonable expectation that it would be liable for the Government's D&D costs decades later. Petitioners also seek an injunction that would prevent the Government from continuing to collect EPACT assessments from them in the future. At the time the

District Court action was commenced, petitioners had collectively paid into the D&D Fund approximately $560 million and were obligated to pay in excess of $1 billion more.

Before commencing the District Court action, each petitioner also brought an action in the CFC seeking a refund of its past D&D Fund payments. In these actions, petitioners alleged that EPACT breached their enrichment services contracts and constituted a "taking" of their property for which just compensation was due. No challenges to the constitutionality of EPACT on Takings, Due Process or any other constitutional ground were asserted. At the Government's request, petitioners' CFC cases were immediately stayed pending the outcome of a related CFC action.[4]

After the District Court action was commenced, petitioners offered to dismiss their individual CFC cases if the Government would agree to pay refunds in the event petitioners were successful in the District Court. The Government declined. In accordance with Federal Circuit precedent, petitioners then amended their CFC complaints to base their refund claims on the outcome of the constitutional challenges being pursued in the District Court, so as to preserve their right to refunds on these grounds. *See, e.g., Creppel v. United States*, 41 F.3d 627 (Fed. Cir. 1994); *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545 (Fed. Cir. 1994). They also sought to extend the stays of their CFC actions, which stays were granted, in substance or effect, in all but one case.[5]

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4. *See Yankee Atomic Electric Co. v. United States*, 33 Fed. Cl. 580 (1995), *reversed*, 112 F.3d 1569 (Fed. Cir. 1997), *cert. denied*, 524 U.S. 951 (1998).

5. *See Commonwealth Edison Co. v. United States*, 46 Fed. Cl. 29 (Fed. Cl. 2000), *appeal docketed*, No. 00-5069 (Fed. Cir.). Four other CFC cases seeking D&D Funds refunds were not stayed and are presently before the Federal Circuit, *sub judice*, but they do not involve any of the petitioners here.

B. *District Court Proceedings*

Initially, the Government brought a motion to stay the District Court action pending the outcome of petitioners' CFC cases. The District Court denied the motion, concluding that petitioners had substantial claims that could not be heard in the CFC because that court has no power to award injunctive relief. *Consolidated Edison Co. of New York, Inc., et al. v. United States, et al.*, 30 F. Supp. 2d 385 (S.D.N.Y. 1998). The Court also ruled that interests of judicial economy weighed heavily in favor of a single, comprehensive proceeding in the District Court, rather than piecemeal adjudication of petitioners' claims in 22 separate actions in the CFC.

Although the District Court certified the stay issue for interlocutory appeal to the Second Circuit Court of Appeals, the Government did not pursue it. Instead, the Government filed a motion to dismiss the District Court action for lack of subject matter jurisdiction on the ground that there had been no waiver of the Government's sovereign immunity under the APA. The Government asserted that petitioners' claims for declaratory and injunctive relief were barred by 5 U.S.C. § 702 because they were, in reality, claims for "money damages" and "impliedly forbidden" by the Tucker Act. In addition, the Government asserted, the District Court lacked jurisdiction under 5 U.S.C. § 704 because the utilities had an "adequate remedy" for their allegedly ongoing constitutional violations: a later claim for money damages under the Tucker Act in the CFC.

Alternatively, the Government asked the District Court to transfer the action to the CFC pursuant to 28 U.S.C. § 1631. This request triggered a statutory stay of all District Court proceedings under 28 U.S.C. § 1292(d)(4)(B), thereby allowing the Government to obtain the very relief that the District Court had days before declined to provide. The transfer motion also invoked 28 U.S.C. § 1292(d)(4)(A),

which provides a right to interlocutory review of district court orders granting or denying motions to transfer to the CFC, and directs all such appeals to the Federal Circuit, rather than the regional courts of appeals.

The District Court denied the Government's motion to dismiss or transfer. Pet. App. 48a-59a. Relying upon Supreme Court and courts of appeals precedent, the court concluded that it had subject matter jurisdiction to determine the constitutionality of federal statutes and to award appropriate declaratory and injunctive relief, without regard to whether the Government had expressly waived its sovereign immunity to such a suit. *Id.* 50a-54a. Even if an express waiver of sovereign immunity were required, the District Court held that the APA clearly provided one, as petitioners sought purely prospective, equitable relief, not compensatory damages. *Id.* 57a. The court also concluded that petitioners' claims depend largely on their rights under the United States Constitution and, therefore, the Tucker Act did not "impliedly forbid" the relief they seek. *Id.* 55a-57a. Finally, the court held, since the CFC would have no jurisdiction to hear petitioners' Due Process Clause claims or grant general equitable relief, the CFC could not provide an "adequate remedy" under 5 U.S.C. § 704. *Id.* 58a-59a. The Government filed a notice of appeal with the Federal Circuit.[6]

C. *The Decisions of the Court of Appeals*

On December 5, 2000, the Federal Circuit, in a 2-1 decision, affirmed and remanded for further proceedings in the District Court. Pet. App. 19a-47a. Relying on *Bowen v. Massachusetts*, 487 U.S. 879 (1988), which it described as

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6. While the Government's appeal was pending, the petitioners' action and three other similar actions pending in the District Court for the District of Columbia were consolidated for pretrial purposes in the Southern District of New York. *See In Re Uranium Decontamination & Decommissioning Fund Litigation*, No. 1330 (J.P.M.L. Feb. 15, 2000).

"similar" to this case, the majority held that the District Court had subject matter jurisdiction over petitioners' equitable claims based on the Takings and Due Process Clauses. It rejected the Government's assertion that petitioners' claims for declaratory and injunctive relief were really claims for "money damages" noting that petitioners, in the District Court, do "not seek the recovery of funds at all, but only an injunction on future EPACT assessments." *Id.* 27a. Accordingly, the Federal Circuit concluded, the CFC could not supply an "adequate remedy" because that court is without authority to award prospective, equitable relief. *Id.* 28a-30a.

The dissent, in contrast, argued that *Bowen* had no application beyond its own facts. Pet. App. 33a-47a. It rejected the *Bowen* court's conclusion that claims for prospective equitable relief should be brought in the district court and argued that petitioners' claims could be adequately remedied in the CFC. *Id.* 43a-47a. Believing that *Bowen* "has created and continues to generate much mischief," and placed "many cases outside the jurisdiction of the CFC," the dissent urged this Court to "apply the coup de grace" to *Bowen*. *Id.* 47a. The majority, however, concluded that it was not free to overrule *Bowen* and that, under this Court's decision in that seminal case, the District Court clearly had subject matter jurisdiction over petitioners' claims:

> We have been given no brief that entitles us to unilaterally declare the Supreme Court misinformed about its view of federal jurisdiction. Accordingly, this court is bound to follow, as best it can, the guidance given it by the majority in *Bowen* and not that of the [*Bowen*] dissent, and to recognize this difference.

Pet. App. 31a-32a.

The Government sought rehearing and rehearing *en banc*, and on May 3, 2001, the Federal Circuit granted its request. Pet. App. 18a. In its *en banc* order, the court of appeals vacated the panel's December 5, 2000 decision and directed it to issue a "revised" opinion. *Id.* In its "revised" opinion, rendered without further briefing or oral argument, the Federal Circuit abandoned its earlier deference to this Court's teachings in *Bowen*, and held that the District Court lacked subject matter jurisdiction over petitioners' claims because the CFC had the power to provide a fully adequate remedy. *Id.* 14a. Accordingly, the court reversed the District Court's order and remanded with instructions to transfer the action to the CFC. *Id.* In a concurring opinion, Senior Circuit Court Judge S. Jay Plager summarized the court's change of position:

> This case confronts the court with a choice between a seemingly illogical Supreme Court rule, calling for a less-than-sensible result, on the one hand, or under-ruling the Supreme Court decision, here *Bowen v. Massachusetts*, 487 U.S. 879 (1988), on the other. This time the court has chosen the latter course. I cannot disagree; it remains to be seen whether the Supreme Court will.

Id. 16a. (Plager, S.C.J., concurring).

In *Bowen*, this Court rejected the Government's "novel" suggestion that the CFC could provide an adequate remedy where declaratory and injunctive relief of a prospective nature is sought to modify the Government's future practices and provide complete relief. 487 U.S. at 904. In its revised opinion, the Federal Circuit concluded that *Bowen* turned entirely on the existence of a complex, ongoing relationship between the federal and state governments involving the allocation of costs under the Medicaid program. Pet. App. 9a-11a. Moreover, the court explained, because petitioners'

District Court case does not "involve a state at all," there are no issues pertaining to "state governmental activities" that would be best addressed in district court. *Id.* 11a. Absent these special circumstances, the court concluded, it was not bound to follow *Bowen*. *Id.*

The Federal Circuit's break with precedent did not end there. Contrary to this Court's decision in *Eastern Enterprises* and other cases establishing the district courts' jurisdiction over constitutional claims, the Federal Circuit held that the CFC could resolve petitioners' Due Process and Takings Clause challenges to EPACT under the so-called " 'illegal exaction' doctrine." Pet. App. 11a. Proceeding from this novel premise, the Federal Circuit concluded that a judgment in favor of petitioners in their CFC cases would be an adequate remedy for their prospective, equitable claims because the *res judicata* effect of such judgments would entitle petitioners to immediate refunds of their future payments. *Id.* 12a. Moreover, in the face of such a judgment, the court could not "imagine that the United States would [thereafter] continue to require the utility companies to pay unlawful exactions." *Id.* 12a. Believing, thus, that a series of refund suits in the CFC would be an adequate remedy for petitioners' claims for prospective, equitable relief, the court concluded that the District Court action should be transferred to the CFC. *Id.* 14a.

Underlying the court of appeals' novel holding and affront to this Court's precedent, was its apparent view that petitioners' District Court action was brought for the sole purpose of evading the decision in *Yankee Atomic Electric Co. v. United States,* 112 F.3d 1569 (Fed. Cir. 1997), *cert. denied*, 524 U.S. 951 (1998). Emphasizing that the procedural posture of this case "seal[ed]" their conclusion, the court held that transfer to the CFC was appropriate because "such blatant forum shopping" should not be tolerated. Pet App. 13a-14a. However, even the Federal Circuit itself recognized

that *Yankee Atomic* did not involve the same Due Process or Takings Clause challenges being advanced by petitioners in the District Court. *Id.* 4a.[7]

On June 7, 2001, the Federal Circuit issued an order staying its mandate upon petitioners' showing that their certiorari petition would present a substantial question meriting this Court's review and that there existed good grounds for a stay. Pet. App. 60a-65a. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

The petition should be granted for at least four reasons.

First, the Federal Circuit's decision completely and deliberately repudiates this Court's seminal decision in *Bowen v. Massachusetts*, 487 U.S. 879 (1988). *Bowen*, along with its progeny, firmly establish that the CFC cannot supply an adequate remedy and deprive a district court of jurisdiction where, as here, declaratory and injunctive relief of a purely prospective nature is sought. This Court's review is necessary to eliminate the substantial confusion the Federal Circuit has created by using the APA to restrict the scope of district

7. Yankee Atomic is not a party to the District Court action or any other district court case. In 1994, it commenced an action in the CFC seeking a refund of past paid assessments based on breach of contract and an asserted taking of its contract rights. On cross-motions for summary judgment brought in advance of discovery, the CFC ruled in Yankee Atomic's favor, *Yankee Atomic Electric Co. v. United States*, 33 Fed. Cl. 580 (1995), but the Federal Circuit, in a 2-1 decision, reversed. *Yankee Atomic Electric Co. v. United States*, 112 F.3d 1569 (Fed. Cir. 1997). The Federal Circuit reached its conclusion, however, without the benefit of a fully developed factual record and was not asked to and did not determine whether EPACT violated the Takings or Due Process Clauses. Following the Federal Circuit's decision, Yankee Atomic sought rehearing and, after that was denied, filed a petition for writ of certiorari, which was denied by this Court. *Yankee Atomic Electric Co. v. United States*, 524 U.S. 951 (1998).

court jurisdiction, and to address the conflict now existing among the circuit courts of appeals as to the proper forum for claims against the United States for purely prospective, equitable relief.

Second, the Federal Circuit's decision cannot be reconciled with this Court's ruling in *Eastern Enterprises, Inc. v. Apfel*, 524 U.S. 498 (1998), and other circuit court decisions establishing that Takings Clause challenges to federal statutes requiring the payment of money to the Government should be brought in federal district court, not in the CFC. Without explanation, the court totally ignores *Eastern Enterprises*, notwithstanding its striking similarity to this case.

Third, the Federal Circuit's holding that the CFC "has long possessed jurisdiction" to consider Due Process Clause challenges to federal statutes under the so-called, but unexplained, "illegal exaction" doctrine is at odds with the jurisprudence of this Court and conflicts with numerous appellate court decisions, including those of the Federal Circuit itself. Prior to the Federal Circuit's decision in this case, it was well-settled that the CFC lacked jurisdiction to entertain damage claims founded on alleged violations of the Due Process Clause. Review is warranted to address the unprecedented expansion of CFC authority that the Federal Circuit accomplishes by roughshod disregard of existing precedents.

Fourth, the Federal Circuit's decision merits immediate review because it sets a rule to govern litigation against the Government in district courts nationwide. Under 28 U.S.C. § 1292(d)(4)(A), the Federal Circuit has exclusive jurisdiction over district court orders granting or denying motions to transfer to the CFC for want of jurisdiction in the district court. The Federal Circuit's disregard of this Court's precedent and effective reordering of the respective jurisdictions of the district courts and the CFC will present

recurring problems of constitutional significance absent this Court's plenary review.

I. THE FEDERAL CIRCUIT'S OPINION "UNDER-RULES" *BOWEN* AND CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEALS

The Federal Circuit reached the conclusion it did here by severely limiting and unjustifiably "under-ruling" this Court's seminal decision in *Bowen v. Massachusetts*, 487 U.S. 879 (1988). Pet. App. 16a. *Bowen* has defined the parameters of federal court jurisdiction under the Tucker Act and APA for more than a decade, and the principles upon which it relies date back more than a century.[8] In *Bowen*, the Commonwealth of Massachusetts brought an action in federal district court seeking a declaratory judgment and injunction to prohibit the government from refusing to reimburse the state for certain Medicaid expenses. On appeal, the government contended that the action should have been brought in the CFC because a money judgment from that court would be an adequate remedy.

This Court, however, disagreed. It first rejected the notion that the Commonwealth's claim, because it involved the payment of money by the Government, was a claim for "money damages" that could be brought only in the CFC. 487 U.S. at 900-01. Rather, the Court explained, a claim for "money damages" is one that seeks compensation for a

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8. *See Bowen*, 487 U.S. at 905 ("the [CFC] does not have the general equitable powers of a district court to grant prospective relief. Indeed, we have stated *categorically* that 'the Court of Claims *has no power to grant equitable relief*'") (emphasis added) citing *Richardson v. Morris*, 409 U.S. 464 (1973) and *Glidden v. Zdonak*, 370 U.S. 530, 557 (1962) (opinion of Harlan, J.) ("From the beginning [the Court of Claims] has been given jurisdiction only to award damages, not specific relief"). *See also United States v. Jones*, 131 U.S. 1 (1889).

past loss or injury, not specific relief. *Id.* Since the Commonwealth was not seeking money in the form of compensation, but specific sums to which it was allegedly entitled, this Court held that the Commonwealth's claim was properly brought in the district court.

The Court also rejected what it described as the Government's "novel submission" that the state's "entire action is barred" because a CFC judgment directing payment of the withheld sums would be an "adequate remedy." 487 U.S. at 902. The Court emphasized that the state sought declaratory and injunctive relief beyond the powers of the CFC, not only to obtain reimbursement of the withheld funds, but to ensure that the Government would not withhold similar funds in the future. *Id.* at 893-94, 900-01. Recognizing that prospective relief in the form of an order requiring the Government "to modify [its] future practices" might be appropriate, this Court announced that it was unwilling "to assume, categorically, that a naked money judgment against the United States will always be an adequate substitute for prospective relief fashioned in light of the rather complex ongoing relationship between the parties." *Id.* at 905. As this Court explained, even if "the purely monetary aspects of the case could have been decided in the Claims Court that is not a sufficient reason to bar that aspect of the relief available in a district court." *Id.* at 910 n.48.

Following *Bowen*, the circuit courts have consistently held that actions against the Government for prospective, equitable relief, rather than money damages, fall within the exclusive domain of the district courts.[9] Prior to its May 3,

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9. *See, e.g., Polanco v. U.S. Drug Enforcement Admin.*, 158 F.3d 647 (2d Cir. 1998) (constitutional challenge to forfeiture proceeding seeking return of money forfeited or commencement of new proceeding); *Veda, Inc. v. United States*, 111 F.3d 37 (6th Cir. 1997) (action for declaratory and injunctive relief challenging compliance with procurement statutes); *Randall v. United States*, (Cont'd)

2001 decision in this case, the Federal Circuit had agreed.[10] In contrast, the court held that actions should be transferred to the CFC where it was evident that a one-time payment of money would make the plaintiff whole.[11] Thus, under *Bowen*

(Cont'd)

95 F.3d 339 (4th Cir. 1996), *cert. denied*, 519 U.S. 1150 (1997) (action seeking correction of military records); *Aetna Casualty & Surety Co. v. United States*, 71 F.3d 475 (2d Cir. 1995) (action to compel government to exercise right of setoff); *Kidwell v. Department of the Army*, 56 F.3d 279 (D.C. Cir. 1995) (action requesting change in military discharge status); *Southeast Kansas Community Action Program, Inc. v. Secretary of Agriculture*, 967 F.2d 1452 (10th Cir. 1992) (action challenging administration of child nutrition program); *Transohio Savings Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598 (D.C. Cir. 1992) (action challenging banking regulations); *Zellous v. Broadhead Assoc.*, 906 F.2d 94 (3d Cir. 1990) (action challenging administration of HUD regulations and seeking order compelling agency to make timely rent adjustments); *Marshall Leasing, Inc. v. United States*, 893 F.2d 1096 (9th Cir. 1990) (action challenging forfeiture of vehicle and seeking return of property); *Esch v. Yeutter*, 876 F.2d 976 (D.C. Cir. 1989) (action challenging reduction in farm subsidies). *See also Tuscon Airport Authority v. General Dynamics Corp.*, 136 F.3d 641, 645-46 (9th Cir. 1998) (Section 704 does not bar action to enforce Government's obligation to indemnify in ongoing and anticipated litigation).

10. *See, e.g., James v. Caldera*, 159 F.3d 573 (Fed. Cir. 1998) (action by army officer seeking reenlistment); *National Center for Mfg. Sciences v. United States*, 114 F.3d 196 (Fed. Cir. 1997) (action by consortium seeking release of funds under Defense Appropriation Act); *Katz v. Cisneros*, 16 F.3d 1204 (Fed. Cir. 1994) (action seeking recalculation of rent under HUD regulations); *Mitchell v. United States*, 930 F.2d 893 (Fed. Cir. 1991) (action for retirement credit and back pay).

11. *See, e.g., Brazos Electric Power Coop. Inc. v. United States*, 144 F.3d 784 (Fed. Cir. 1998) ("single, uncomplicated payment of money" to plaintiff would provide "an entirely adequate remedy" for claim to compel performance of contract); *Kanemoto v. Reno*, 41 F.3d 641 (Fed. Cir. 1994) (action to enforce federal statute providing compensation to Japanese citizens interned during World War II).

and its progeny, actions for declaratory and injunctive relief that do not seek the payment of money as compensatory relief, but rather an order compelling the Government to take or refrain from taking certain action, fall squarely within the subject matter jurisdiction of district courts.

The Federal Circuit's decision here, which repudiates this entire line of precedent, is based upon the court's unjustified view that *Bowen* should be limited to its own facts. According to the Federal Circuit, *Bowen* has no application beyond Medicaid disallowance decisions or other situations involving an ongoing relationship between federal and state governments. Pet. App. 9a-10a. As a result, the court held that petitioners have no right to pursue their claims for declaratory and injunctive relief to redress ongoing constitutional violations in the district court, but must pursue a series of refund actions in the CFC. *Id.* 14a.

The Federal Circuit's extremely narrow view of *Bowen* and corresponding disregard for its progeny are unjustified. There is nothing in the majority's opinion in *Bowen* — or any subsequent decision of this Court — which suggests that it should be given such a restrictive reading. In contrast, this Court has followed *Bowen* in a variety of factual settings, including, most notably, in *Eastern Enterprises*, which involved claims nearly identical to the ones at issue here. *See Eastern Enterprises*, 524 U.S. 498 (1998) (Due Process and Takings Clause challenges to federal statute requiring payment of money to government fund). *See also Department of Army v. Blue Fox, Inc.*, 525 U.S. 255 (1999) (applying *Bowen* to dispute between government and contractor over payment of sums due on government construction project); *Darby v. Cisneros*, 509 U.S. 137 (1993) (action by real estate developer challenging government's decision to bar him from participating in federal programs). Indeed, if the Federal Circuit's limited view of *Bowen* were correct, the plaintiff in *Eastern Enterprises* would not have been entitled to

declaratory or injunctive relief, but would have been forced to make payments under the Coal Act and then pursue a series of refund actions in the CFC.

The Federal Circuit's tortured reading of *Bowen* and its progeny cannot be justified by the court's entirely misplaced concern with forum-shopping. As this Court and other circuits (including the Federal Circuit) have repeatedly recognized, where both equitable and monetary relief are necessary to make a plaintiff whole, a plaintiff may be required simultaneously to bring one action in the district court challenging the validity or constitutionality of the agency's action, and another in the CFC to obtain compensation. *See Pennsylvania R.R. Co. v. United States*, 363 U.S. 202 (1960); *Creppel v. United States*, 41 F.3d 627 (Fed. Cir. 1994); *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545 (Fed. Cir. 1994); *Charter Federal Savings Bank v. Office of Thrift Supervision*, 976 F.2d 203 (4th Cir. 1992); *Hahn v. United States*, 757 F.2d 581 (3d Cir. 1985). Although this procedure may appear "illogical" as the concurring opinion of Senior Circuit Court Judge Plager suggests, *id.* 16a, it merely reflects the distinct jurisdictional make-up of these two federal courts. Thus, as the District Court properly concluded, the procedural posture of this case does not justify departure from this Court's clear precedent.[12] Pet. App. 48a-59a.

Moreover, where, as here, the constitutionality of a federal statute is at issue, this Court has repeatedly recognized the right of litigants to seek equitable relief in the district court. *See, e.g.*, *Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("when constitutional questions are in issue, the availability

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12. *See also New York Power Authority v. United States*, 42 Fed. Cl. 795, 803 (1999) (rejecting the Government's forum shopping label noting that "it is not for this court to monitor the propriety of a party's litigation tactics as long as it is allowed under federal law").

of judicial review is presumed); *Bell v. Hood*, 327 U.S. 678 (1946) ("it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution"); *see also United States v. Vazquez*, 145 F.3d 74 (2d Cir. 1998) (no waiver of sovereign immunity required for constitutional challenge). In the same vein, this Court has held that the APA should be construed broadly to reflect Congress' clear intent to eliminate barriers to judicial review. *See, e.g., Bennett v. Spear*, 520 U.S. 154 (1997); *Bowen*, 487 U.S. at 903-04; *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967). Moreover, when a conflict concerning jurisdiction arises between the CFC under the Tucker Act, and the district court under the APA, " '[t]he policies of the APA take precedence over the Tucker Act.' " *Bowen*, 487 U.S. at 908 n.46, quoting, *Delaware Div. of Health and Social Services v. Department of Health and Human Services*, 665 F. Supp. 1104, 1117 n.15 (D. Del. 1987).

The Federal Circuit's decision, stripping the District Court of power to issue declaratory or injunctive relief in a case that seeks absolutely no monetary payment by the Government at all, cannot be reconciled with *Bowen*, its progeny and decades worth of this Court's related precedent. The court's strained reading of *Bowen* renders its continued vitality beyond Medicaid disallowance litigation highly suspect and creates considerable confusion as to the proper forum for actions against the Government requesting purely equitable relief. This Court's review is necessary to restore certainty and avoid further wasteful litigation over important issues of jurisdiction and sovereign immunity that repeatedly arise in litigation against the Government. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800 (1988).

II. THE FEDERAL CIRCUIT'S OPINION IS IRRECONCILABLE WITH THIS COURT'S DECISION IN *EASTERN ENTERPRISES v. APFEL*

The Federal Circuit's decision inexplicably ignores this Court's ruling in *Eastern Enterprises*, despite the striking similarity between the two cases. In *Eastern Enterprises*, the plaintiff, Eastern, brought an action in Massachusetts district court alleging that certain provisions of the Coal Act Industry Retiree Health Benefit Act of 1992 ("Coal Act"), which required it to make annual payments to a fund providing health and retirement benefits to coal mine workers, violated the Takings and Due Process Clauses of the Fifth Amendment. Eastern, like petitioners here, sought declaratory and injunctive relief from its ongoing payment obligations. Although the Government did not challenge the district court's jurisdiction over Eastern's Due Process Clause claim, this Court did examine, *sua sponte*, whether *Eastern's* request for declaratory and injunctive relief on its Takings Clause challenge should be brought in the district court or the CFC. The Court held that where, as here, the challenged statute requires the payment of money to the Government, an action for equitable relief is properly brought in the district court because the CFC cannot provide a remedy. The Court reasoned:

> [A] claim for compensation under the Takings Clause must be brought to the Court of Federal Claims in the first instance.
>
> In this case, however, *Eastern does not seek compensation* from the Government. Instead, Eastern requests a declaratory judgment that the Coal Act violates the Constitution and a corresponding injunction against . . . enforcement of the Act as to Eastern. Such equitable relief is arguably not within the jurisdiction of the Court of Federal Claims under the Tucker Act. See *United States v. Mitchell*, 463 U.S. 206, 216 77 L.Ed. 2d 580, 103 S.Ct. 2961

> (1983) (explaining that, in order for a claim to be "cognizable under the Tucker Act," it "must be one for money damages against the United States"); see also, *e.g.*, *Bowen v. Massachusetts*, 487 U.S. 879, 905 101 L.Ed. 2d 749, 108 S.Ct. 2722 (1988).

Id. at 520 (emphasis added). Rather, as the Court explained:

> *[I]n a case such as this one, it cannot be said that monetary relief against the Government is an available remedy.* . . . [T]he "presumption of Tucker Act availability must be reversed where the challenged statute, rather than burdening real or physical property, requires a direct transfer of funds" mandated by the Government. In that situation, a claim for compensation "would entail an utterly pointless set of activities." Instead, as we explained in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 71, n. 15 (1978), the Declaratory Judgment Act "allows individuals threatened with a taking to seek a declaration of the constitutionality of the disputed governmental action before potentially uncompensable damages are sustained."
>
> . . . Based on the nature of the taking alleged in this case, we conclude that *the declaratory judgment and injunction sought by petitioner constitute an appropriate remedy under the circumstances, and that it is within the district courts' power to award such equitable relief.*

Id. at 521-22 (emphasis added) (citations omitted).

The Federal Circuit's decision here, that the District Court has no jurisdiction over the exact same constitutional challenges to a federal statute similar to EPACT, conflicts directly with this Court's holding in *Eastern Enterprises*. The parallels between this case and *Eastern Enterprises* are

clear. Here, as in *Eastern Enterprises*, the challenged statute, EPACT, requires a "direct transfer of funds mandated by the Government" and petitioners, like Eastern, "request[] a declaratory judgment that the . . . Act violates the Constitution [on Takings and Due Process grounds and seek] a corresponding injunction against . . . enforcement of the Act." 524 U.S. at 520. As in *Eastern Enterprises*, a claim for compensation " 'would entail an utterly pointless set of activities' " for " '[e]very dollar paid pursuant to a statute would be presumed to generate a dollar of Tucker Act compensation.' " *Id.* at 521. Accordingly, as in *Eastern Enterprises*, "the declaratory and injunctive relief sought [by petitioners] . . . is within the district courts' power to award such equitable relief." *Id.* at 522.[13]

The Federal Circuit's opinion here also conflicts with other circuit court decisions holding that Takings Clause challenges to federal statutes requiring the payment of money to the Government should be brought in district court and not the CFC. *See, e.g., Student Loan Marketing Ass'n v. Riley*, 104 F.3d 397, 401-02 (D.C. Cir.), *cert. denied*, 522 U.S. 913 (1997) (Tucker Act does not deprive district court of

13. The fact that Eastern made no payments under the Coal Act and thus, had no refund action pending in the CFC does not distinguish this case from *Eastern Enterprises*. The issue posited by this Court was *whether* Eastern should first file a CFC suit before proceeding in the district court, and this Court concluded that no such suit was required. 524 U.S. at 520-21. There is no indication that the Court would have reached a different conclusion had Eastern, like petitioners here, filed a CFC action as a protective measure pending resolution of the constitutional questions in the district court. In any event, Eastern did not make any payments before commencing its district court action because the defendant fund, as the Government knows, agreed to accept a letter of credit in lieu of payment pending a determination of the constitutional issues presented. Other coal companies that challenged the Coal Act in district court did make payments and following the Supreme Court's decision in *Eastern Enterprises*, sought, and in many cases, received refunds. *See, e.g., Mary Helen Coal Corp. v. Hudson*, 235 F.3d 207 (4th Cir. 2000).

jurisdiction over Takings Clause challenge to statute "involving straightforward mandates of cash payment to the government"); *In Re Chateaugay Corp.*, 53 F.3d 478, 491-92 (2d Cir.), *cert. denied, LTV Steel Co. v. Shalala*, 516 U.S. 913 (1995) ("no merit" to suggestion that Tucker Act removes district court from jurisdiction over constitutional challenges to Coal Act).

One member of the Federal Circuit, in a subsequent decision in this case, questioned the vitality of *Eastern Enterprises* because it is a plurality opinion. Pet. App. 64a. The plurality nature of the decision, however, does not eliminate its value as precedent. *See, e.g., City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 764 (1988); *Marks v. United States*, 430 U.S. 188, 193-94 (1977). Indeed, since *Eastern Enterprises*, the circuit courts have entertained numerous actions involving Fifth Amendment challenges without questioning the district court's exercise of jurisdiction. *See Blue Diamond Coal Co. v. Trustees of the UMWA Combined Benefit Fund*, 2001 WL 459913 (6th Cir. 2001) (Coal Act payments); *Mary Helen Coal Corp. v. Hudson*, 235 F.3d 207 (4th Cir. 2000) (same); *United States Fidelity & Guar. Co. v. McKeithen*, 226 F.3d 412 (5th Cir. 2000) (Louisiana workers' compensation fund). To the extent, however, that courts are unclear as to the weight to be given *Eastern Enterprises*, review is warranted to avoid continued confusion over the important jurisdictional question that prompted this Court to examine the issue in *Eastern Enterprises* in the first place.

III. THE FEDERAL CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S JURISPRUDENCE AND CREATES A SPLIT AMONG THE CIRCUITS CONCERNING THE PROPER FORUM FOR DUE PROCESS LITIGATION

This Court has long held that actions against the Government under the Tucker Act cannot be maintained in the CFC unless they are premised upon a constitutional provision, federal statute or regulation that mandates compensation by the Government. *See, e.g., United States v. Mitchell*, 463 U.S. 206, 218 (1983); *United States v. Testan*, 424 U.S. 392, 400 (1976); *Richardson v. Morris*, 409 U.S. 464 (1973); *United States v. King*, 395 U.S. 1 (1969); *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962); *United States v. Jones*, 131 U.S. 1 (1889). Because the Due Process Clause is not money-mandating, actions against the Government based upon such violations are deemed to be beyond the purview of the CFC under the Tucker Act. *See, e.g., Richardson*, 409 U.S. at 464-65 (Tucker Act does not provide jurisdiction over due process and equal protection challenges to Social Security Act); *United States v. Clark*, 445 U.S. 23, 37 (1980) ("[t]he Court of Claims . . . was wrong in resolving this case on the basis of its constitutional holding, both as a matter of prudential considerations as well as jurisdiction") (Rehnquist, J. dissenting).[14]

The circuit courts of appeals, relying on this Court's precedent, have repeatedly held that the CFC has no jurisdiction over Due Process Clause claims, *see, e.g., Rothe Development Corp. v. United States*, 194 F.3d 622 (5th Cir. 1999); *Polanco v. U.S. Drug Enforcement Admin.*, 158 F.3d 647 (2d Cir. 1998); *Lake Mohave Boat Owners Ass'n v. National Park Service*, 78 F.3d 1360 (9th Cir. 1996);

14. *See also United States v. Hopkins*, 427 U.S. 123 (1976) (noting that counsel conceded during oral argument that *Testan* foreclosed his due process clause claim).

Marshall Leasing, Inc. v. United States, 893 F.2d 1096 (9th Cir. 1990); *Clark v. Library of Congress*, 750 F.2d 89 (D.C. Cir. 1984), and prior to its decision in this case, the Federal Circuit did so as well. *See, e.g., James v. Caldera*, 159 F.3d 573 (Fed. Cir. 1998); *Crocker v. United* States, 125 F.3d 1475 (Fed. Cir. 1997); *LeBlanc v. United States*, 50 F.3d 1025 (Fed. Cir. 1995); *Hamlet v. United States*, 63 F.3d 1097 (Fed. Cir. 1995), *cert. denied*, 517 U.S. 1155 (1996); *Murray v. United States*, 817 F.2d 1580 (Fed. Cir. 1987).

However, without so much as a passing reference to this contrary precedent, the Federal Circuit here held that the CFC is free to adjudicate Due Process Clause claims where the asserted violation is couched as an "illegal exaction." Accordingly, the court concluded, petitioners' Due Process Clause challenges to EPACT could be fully adjudicated in the CFC as claims for reimbursement of allegedly illegally exacted funds.

The Federal Circuit's conclusion that the CFC can resolve Due Process Clause challenges to federal statutes expands the jurisdiction of the CFC beyond that previously recognized by an appellate court. The only case upon which the Federal Circuit relies that involved a constitutional question is *Mallow v. United States*, 161 Ct. Cl. 446 (1963), but there, the federal statute at issue had been declared unconstitutional by this Court in a prior action originating in district court. Thus, the Court of Claims did not independently determine whether the statute violated the Due Process Clause, but merely applied controlling Supreme Court precedent. The other two cases cited by the Federal Circuit — *New York Life Ins. Co. v. United States*, 118 F.3d 1553 (Fed. Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998), and *Eastport S.S. Corp. v. United States*, 372 F.2d 1002 (Ct. Cl. 1967) ("*Eastport*") — involved no constitutional issues at all.

Moreover, *Eastport* did not even involve an illegal exaction claim. In contrast, in *Eastport*, the plaintiff sought damages from the United States for interference with contract. The court dismissed the claim because no federal statute, regulation or constitutional provision provided Eastport with a right to recover from the government. *Id.* at 608-613. Before reaching the merits, the court purported to summarize the bases of its jurisdiction in various cases, including one such category of cases which the court described as ". . . those in which 'the Government has the citizen's money in its pocket' and the claim is 'to recover an illegal exaction. . . .' " 178 Ct. Cl. at 605-606. The court emphasized, however, that suits could be brought in the CFC to recover such exactions " 'except where Congress has expressly placed jurisdiction elsewhere.' " *Id.*

Prior to the Federal Circuit's decision in this case, no appellate court had held that *Eastport*'s illegal exaction language deprives the district court of power to determine the constitutionality of federal statutes under the Due Process Clause, or that it confers such power on the CFC.[15] Although this Court has occasionally referred to the illegal exaction discussion in *Eastport,* it has done so in *dicta* and without further discussion of the issue. *See Testan*, 424 U.S. at 402; *see also Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 432 (1990) (same); *Army and Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 740 n.11 (1982) (same).

In contrast, this Court has consistently reviewed Due Process Clause challenges to federal statutes requiring the payment of money without questioning the exercise of

15. The CFC has considered the issue, but has reached conflicting results. *Compare New York Power Authority v. United States*, 42 Fed. Cl. 795 (1999) (CFC has no power to adjudicate Due Process Clause claim) *with Commonwealth Edison Co. v. United States*, 46 Fed. Cl. 29 (2000) (CFC has power to hear Due Process Clause claim).

jurisdiction by the district court. *See, e.g., Eastern Enterprises*, 524 U.S. at 520; *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984); *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). In none of these cases did this Court suggest that the Due Process Clause claims should have been brought in the CFC because that court, under an "illegal exaction" theory, could provide an adequate remedy.

The Federal Circuit here held that the illegal exaction theory based on *Eastport's dicta*, deprives the District Court of power to adjudicate petitioners' Due Process Clause claims. Nothing in *Eastport*, however, justifies the court's broad departure from precedent or its expansive view of the CFC's power to hear Due Process Clause challenges to federal statutes. This Court's review is warranted to clarify the scope of the district court's jurisdiction over these important questions and to eliminate the substantial confusion that the Federal Circuit's decision creates as to the proper forum for a whole class of constitutional litigation against the Government.

IV. THIS CASE IS AN EXCELLENT VEHICLE FOR RESOLUTION OF SEVERAL IMPORTANT ISSUES THAT WILL HAVE NATIONWIDE IMPLICATIONS BEYOND THE CIRCUMSTANCES PRESENTED IN THIS CASE

With remarkable disregard of this Court's precedent, the Federal Circuit's decision here reorders the respective jurisdiction of the district court and the CFC in constitutional litigation involving the United States. It construes the CFC's jurisdiction broadly to include an entire category of cases involving Due Process and Takings Clause challenges to federal statutes that heretofore have rested solely within the

domain of the district courts.[16] Conversely, the court's decision strips the district courts of jurisdiction to review the constitutionality of federal statutes and to award corresponding declaratory and injunctive relief to redress threatened harm whenever a claim for money, after-the-fact, might be maintained in the CFC. As this Court observed, "Congress has the constitutional authority to define the jurisdiction of the lower federal courts . . . and, once the lines are drawn, 'limits upon federal jurisdiction . . . must be neither disregarded nor evaded.' " *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993), quoting *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978) (citations omitted). The Federal Circuit's decision here blurs these well-established jurisdictional lines.

There are potentially far-reaching implications. Under 28 U.S.C. § 1292(d)(4)(A), enacted in 1988, the Federal Circuit has exclusive jurisdiction over district court orders granting or denying motions to transfer actions to the CFC for want of jurisdiction in the district courts. As such, the court's decision sets a rule that will have *stare decisis* effect in district courts nationwide as to the proper forum for claims for equitable relief based on Takings and Due Process Clause challenges to federal revenue-generating statutes.

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16. Indeed, Congress recently declined to give the CFC the very power that the Federal Circuit, with a stroke of the pen, here conferred upon that court. In the Tucker Act Shuffle Relief Act of 1997, Congress proposed to expand the power of the CFC to determine the constitutionality of federal statutes under the Takings Clause and to award corresponding declaratory and injunctive relief. *See* H.R. 105-424, 105th Congress, 2d Sess. (1998). The Government opposed the amendment on grounds that it would present serious constitutional difficulties under Article I-Article III separation of powers principles. *Id. See also The Tucker Act Shuffle Relief Act of 1997: Hearings on H.R. 992 Before the Subcomm. on Immigration and Claims of the House Comm. of the Judiciary,* 105th Cong. (1997) (Statement of Eleanor D. Acheson, Assistant Attorney General, Office of Policy Development). The legislation ultimately failed.

The regional courts of appeals, lacking jurisdiction over these precise issues, will have little or no opportunity to challenge the Federal Circuit's position. The only check on the exercise of the Federal Circuit's power, thus, lies by way of review in this Court.

In addition, the jurisdictional issues raised here are not limited to the unique circumstances presented in this case. There are dozens of federal statutes currently in force requiring the payment of billions of dollars of "assessments" to fund a wide array of federal programs. *See, e.g.*, 7 U.S.C. § 7416 (assessments imposed for promotion, research and information regarding agricultural commodities); 42 U.S.C. § 2214 (annual assessments levied by Nuclear Regulatory Commission); 12 U.S.C. § 4516 (annual assessments levied on federal mortgage associations and corporations). These statutory schemes frequently come under attack on various constitutional grounds, often in protracted proceedings, as is evident from the Coal Act litigation which has now spanned almost an entire decade. *See, e.g., Eastern Enterprises*, 524 U.S. at 519.

The Federal Circuit's decision also will reverberate well beyond the particular parties to this dispute and potentially impact a broad class of constitutional litigation against the Government. Under the Federal Circuit's rationale, all constitutional challenges to federal legislation requiring the payment of money to the Government may not be heard in the district court, but should be brought in the CFC. Thus, if the Federal Circuit's decision is allowed to stand, it will potentially extend the CFC's jurisdiction to a whole panoply of constitutional challenges to federal statutes requiring the payment of money to the Government, such as the one recently invalidated by this Court on First Amendment grounds. *See United States v. United Foods, Inc.*, 121 S. Ct. 2334 (2001) (statute requiring mushroom handlers to pay assessments to fund Government advertising program violates First Amendment).

This case also is uniquely suitable as a vehicle for addressing the jurisdictional issues presented here. More than two-thirds of the domestic utilities challenging EPACT and the D&D Fund are parties to this proceeding. The precise questions presented here are also pending in three other district court actions and approximately 30 CFC cases, none of which involve the broad array of parties here. Accordingly, this Court's decision will establish the future course of this and any future D&D Fund litigation, thereby avoiding duplicative and piecemeal review of the issues in each of these separate cases.

This Court's plenary review is respectfully requested to resolve the conflicts and eliminate the confusion which the Federal Circuit's decision now presents.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DATED AND DECIDED MAY 3, 2001

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

99-1464

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., NEW YORK POWER AUTHORITY, NIAGARA MOHAWK POWER CORPORATION, ROCHESTER GAS AND ELECTRIC CORPORATION, ARIZONA PUBLIC SERVICE CORPORATION, COMMONWEALTH EDISON COMPANY, DUKE ENERGY CORPORATION, ENTERGY GULF STATES, INC., FLORIDA POWER CORPORATION, FLORIDA POWER AND LIGHT COMPANY, GPU NUCLEAR, INC. (on behalf of Jersey Central Power & Light Company, Metropolitan Edison Company, and Pennsylvania Electric Company), INDIANA MICHIGAN POWER COMPANY, NEBRASKA PUBLIC POWER DISTRICT, PECO ENERGY COMPANY, SOUTHERN CALIFORNIA EDISON COMPANY, SOUTHERN NUCLEAR OPERATING COMPANY, INC., SYSTEM FUELS, INC., TEXAS UTILITIES ELECTRIC COMPANY, VIRGINIA ELECTRIC & POWER COMPANY, WASHINGTON PUBLIC POWER SUPPLY SYSTEM, WISCONSIN PUBLIC SERVICE CORPORATION, and WOLF CREEK NUCLEAR OPERATING CORPORATION (on behalf of Kansas City Power & Light Company, Kansas Electric Power Cooperative, Inc., and Kansas Gas and Electric Company),

Plaintiffs-Appellees,

v.

Appendix A

UNITED STATES, DEPARTMENT OF ENERGY, DEPARTMENT OF ENERGY AS SUCCESSOR TO THE UNITED STATES ATOMIC ENERGY COMMISSION, and ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION,

Defendants-Appellants.

* * *

Appealed from: United States District Court for the Southern District of New York

Senior Judge Whitman Knapp

* * *

DECIDED: May 3, 2001

Before RADER, *Circuit Judge*, PLAGER, *Senior Circuit Judge*,* and GAJARSA, *Circuit Judge*.

Opinion for the court filed by *Circuit Judge* RADER. Concurring opinion filed by *Senior Circuit Judge* PLAGER.

RADER, *Circuit Judge*.

Consolidated Edison Company of New York and twenty-one other nuclear utilities (collectively, Con Ed) sued the United States, the Department of Energy, and the Energy

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* Judge Plager assumed senior status on November 30, 2000.

Appendix A

Research and Development Administration in the United States District Court for the Southern District of New York seeking declaratory judgments and injunctive relief. *Consol. Edison Co. of N.Y. v. United States*, 45 F. Supp. 2d 331 (S.D.N.Y. 1999). Con Ed's suit challenged the constitutionality of the Energy Policy Act of 1992 (EPACT), 42 U.S.C. § 2297g (1994), on due process and takings grounds. The district court denied the Government's motion to transfer the case to the United States Court of Federal Claims, or alternatively, to dismiss.

On December 5, 2000, this court affirmed the district court's decision to deny the Government's motion. The Government filed a suggestion that this court rehear that December 5 decision *en banc*. This court unanimously accepted the petition. Accordingly, this court, acting *en banc*, vacated the judgment of this court entered on December 5, 2000, and reported at 234 F.3d 642 (Fed. Cir. 2000). The *en banc* court then reassigned the opinion to the panel for revision. Because the Court of Federal Claims can offer an adequate remedy in this case, this court now reverses and remands.

I.

Con Ed sued the Government, challenging the constitutionality of EPACT. Before EPACT, Con Ed contracted with the Government for uranium enrichment services under a series of fixed-price agreements. After enactment of EPACT in 1992, the Government began decontaminating and decommissioning several of its uranium processing facilities. EPACT stipulated that the Government

would pay sixty-eight percent of the decontamination and decommissioning costs; annual assessments on domestic nuclear utilities would supply the remaining thirty-two percent. EPACT made the Department of Energy responsible for computing each utility's share of the assessment in proportion to that utility's use of Government enrichment services in the past. 42 U.S.C. § 2297g-1(c) (1994) (amended 1998).

After making initial payments under EPACT, Con Ed, and other nuclear utilities not parties to this suit, sued the Government in the Court of Federal Claims seeking refunds of those payments. The lawsuits before the Court of Federal Claims asserted many of the same constitutional grounds as this lawsuit. In one such case, this court reversed the Court of Federal Claims' grant of summary judgment in favor of a nuclear utility, concluding that collection of the assessments under EPACT did not violate the utility's contract under which it had purchased the enriched uranium from the government, nor constituted a taking of the utility's contract rights. *Yankee Atomic Elec. Co. v. United States*, 112 F.3d 1569 (Fed. Cir. 1997), *cert. denied*, 118 S. Ct. 2365 (1998).

After several subsequent nuclear utility losses in the Court of Federal Claims, Con Ed filed this suit in the district court. Instead of seeking refunds of assessments, however, Con Ed sought a declaratory judgment that EPACT was unconstitutional on several grounds and an injunction on enforcement of the EPACT assessments. By taking this procedural posture, Con Ed sought a hearing in another forum. To achieve this objective, Con Ed drew its complaint to avoid prayers for relief actionable in the Court of Federal

Claims, such as claims against the United States for money damages. *See* 5 U.S.C. § 702 (1994).

The Government moved the district court to transfer this case to the Court of Federal Claims, where other nuclear utility cases await disposition. The Government contended that Con Ed's suit in the district court under the Administrative Procedure Act (APA) amounts to impermissible forum shopping. The APA, according to the Government, does not waive sovereign immunity from this suit in the district court because Con Ed can obtain full legal relief, if successful, in the Court of Federal Claims. Specifically, the Government noted that the Court of Federal Claims has, on occasion, asserted power under the Tucker Act to order a full refund of illegally exacted funds. *See* 28 U.S.C. § 1491(a)(1) (1994); *New York Life Ins. Co. v. United States*, 118 F.3d 1553 (Fed. Cir. 1997). Thus, if Con Ed can show illegal exaction of EPACT assessments, the Government maintained, the Court of Federal Claims may have authority to order a refund. Lawsuits seeking that remedy were already pending in the Court of Federal Claims.

The Government discounted potential restrictions on the Court of Federal Claims' power to order injunctive or other prospective relief. If the EPACT assessments in fact violate constitutional guarantees, the Government asserted, injunctive relief would not be necessary. Rather, *res judicata* would bar the Government from future assessments against Con Ed under EPACT in the face of a Court of Federal Claims illegal exaction judgment. In addition, the Government assured that it would not attempt to make future assessments after a loss in the Court of Federal Claims.

In the face of these arguments, the district court denied the Government's motion. The district court cited cases from the United States Court of Appeals for the Second Circuit and the United States Supreme Court to confirm that the APA waives the sovereign immunity of the United States for suits that properly invoke equitable relief from agency action. *Bowen v. Massachusetts*, 487 U.S. 879, 904 (1988); *In re Chateaugay Corp.*, 53 F.3d 478, 493 (2d Cir. 1995). After denying the Government's motion, the district court certified the jurisdictional question for interlocutory review. This court has exclusive jurisdiction to hear the appeal under 28 U.S.C. § 1292(d)(4)(A) (1994).

II.

The sole question in this case is whether the APA waives sovereign immunity for an action in a district court on the merits of Con Ed's claim because Con Ed seeks declaratory and prospective injunctive relief, rather than a refund of EPACT payments. This court reviews legal questions, such as jurisdiction and authority of the Court of Federal Claims and the district court, without deference. *Terran v. Sec'y of Health & Human Servs.*, 195 F.3d 1302, 1309 (Fed. Cir. 1999).

To invoke the jurisdiction of a federal court for relief from monetary obligations imposed by a federal agency, a litigant must show that the United States has waived its sovereign immunity. *Kanemoto v. Reno*, 41 F.3d 641, 644 (Fed. Cir. 1994) (citing *United States v. Sherwood*, 312 U.S. 584, 586-87 (1941) ("The terms of [the sovereign's] consent to be sued in any court define that court's jurisdiction to

entertain the suit.")). The Supreme Court has explained that a litigant may invoke the APA as a waiver of sovereign immunity, thereby invoking district court jurisdiction, if the litigant can satisfy both 5 U.S.C. § 702 (by requesting "relief other than money damages") and 5 U.S.C. § 704 (1994) (no "adequate remedy" is available elsewhere, such as the Court of Federal Claims). *Bowen*, 487 U.S. at 892-93, 904-05. Although Con Ed may satisfy § 702 by not seeking "money damages," jurisdiction still lies in the Court of Federal Claims because that court can provide an "adequate remedy" in this case within the meaning of § 704.

Under specified circumstances, the APA waives sovereign immunity for actions challenging agency actions in district court. Section 702 provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States *seeking relief other than money damages* and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. . . . Nothing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 702 (emphasis added). Thus, the APA "eliminat[es] the defense of sovereign immunity in cases covered by [§ 702]." *Bowen*, 487 U.S. at 892.

Section 702, however, denies this sovereign immunity waiver to claims for money damages or for claims that seek remedies "expressly or impliedly" precluded by other statutes. 5 U.S.C. § 702; *Transohio Sav. Bank v. Dir., Office of Thrift Supervision*, 967 F.2d 598, 607 (D.C. Cir. 1992). In *Bowen*, the Supreme Court examined this limitation on APA waivers. In that case, the Commonwealth of Massachusetts sought review of a final order of the Secretary of Health and Human Services refusing to reimburse a category of Medicaid expenses. *Bowen*, 487 U.S. at 882. The Supreme Court set forth reasons that § 702's exclusion for money damages claims did not foreclose district court judicial review of Massachusetts' monetary claims. As explained below, however, this court need not address the § 702 limitation in this case because another limitation on APA review precludes district court review.

In addition to § 702's "money damages" limitation, § 704 of the APA further excludes from the APA's sovereign immunity waiver those claims for which adequate remedies are elsewhere available. 5 U.S.C. § 704; *Transohio*, 967 F.2d at 608. Section 704 states, in relevant part: "Agency action made reviewable by statute and final agency action for which there is *no other adequate remedy* in a court are subject to judicial review." 5 U.S.C. § 704 (emphasis added). In other words, a claimant with an alternative adequate remedy in another court, such as the Court of Federal Claims, cannot seek review of agency action in a district court under the APA.

Therefore, Con Ed must show that § 704 does not withdraw any waiver of sovereign immunity otherwise granted by § 702. Section 704 codifies a requirement ensuring that the general grant of review in the APA does not "duplicate existing procedures for review of agency action." *Bowen*, 487 U.S. at 903. In effect, § 704 withdraws the limited waiver of immunity under § 702 if an adequate judicial remedy is already available elsewhere. 5 U.S.C. § 704; *see also Kanemoto*, 41 F.3d at 644 ("[W]here agency action is otherwise reviewable in court and an adequate remedy is available in connection with that review, the APA's waiver of sovereign immunity under section 702 is not available."); *Mitchell v. United States*, 930 F.2d 893, 895-96 (Fed. Cir. 1991).

As noted earlier, the district court relied on the Supreme Court's *Bowen* decision for the proposition that the Court of Federal Claims could not offer an adequate remedy in this case. *Consolidated Edison*, 45 F. Supp. 2d at 336 (stating that APA has waived sovereign immunity "[b]ecause the relief sought here is disproportionately prospective and therefore equitable (as opposed to compensatory)."). *Bowen*, however, does not enunciate a broad rule that the Court of Federal Claims cannot supply an adequate remedy in any case seeking injunctive relief.

At the outset, this court notes that the Supreme Court's ruling in *Bowen* emphasized the complexity of the continuous relationship between the federal and state governments administering the Medicaid program. The Supreme Court was "not willing to assume, categorically, that a naked money judgment against the United States will always be an

adequate substitute for prospective relief fashioned in the light of the rather complex ongoing relationship between the parties." *Bowen*, 487 U.S. at 905. The Supreme Court's choice of absolute language such as "categorically" and "always" leaves room for the proposition that the Court of Federal Claims may well supply an adequate remedy in cases without a complex ongoing federal-state interface. *See, e.g.*, *Kanemoto*, 41 F.3d at 645. Unlike the Medicaid program with its shifting populations and demographics, advancing medical technologies, unforeseeable health threats, and varying state and federal economic conditions, the relationship between Con Ed and the United States features a known and fixed series of payments over time. For this reason, among others, *Bowen* does not enunciate the categorical rule that the district court attributed to it.

In *Bowen*, the Supreme Court gave several other reasons that the Court of Federal Claims could not supply an adequate remedy in that particular complex ongoing federal-state relationship. For instance, the Court labeled "doubtful" "the jurisdiction of the [Court of Federal Claims] to entertain the action, or perhaps even to enter a specific money judgment against the United States." *Id.* at 905; *see also Bowen* at 906 n.42. Although the Supreme Court had doubts about the Court of Federal Claims' jurisdiction over Medicaid disallowance decisions, this case presents no jurisdictional problems. The Court of Federal Claims has long possessed jurisdiction to consider constitutional claims, such as Con Ed's claims about the EPACT assessments, under the "illegal exaction" doctrine. *New York Life Ins.*, 118 F.3d at 1553; *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967); *Mallow v. United States*, 161 Ct. Cl. 446

(1963). Indeed, the factual background and the constitutional claims at issue in the current litigation overlap with those already before the Court of Federal Claims. Thus, another reason for the Supreme Court's apprehensions in *Bowen* is not present in this case.

The Supreme Court further suggested in *Bowen* that "the nature of the controversies that give rise to disallowance decisions typically involve state governmental activities that a district court would be in a better position to understand and evaluate than a single tribunal headquartered in Washington." 487 U.S. at 907-08. Unlike *Bowen*, which involved a dispute between the Commonwealth of Massachusetts and the United States, this case does not involve a state at all. This case relates to a contract between the utilities and the Government, and specifically, the utilities' financial obligations under EPACT. This case does not involve the complexities of government-to-government relationships. This case does not involve "[m]anaging the relationships between States and the Federal Government that occur over time and that involve constantly shifting balance sheets." *Id.* at 904 n.39. In sum, this case does not "involve state governmental activities that a district court would be in a better position to understand and evaluate" than the Court of Federal Claims. *Id.* at 907-08. In *Bowen*, the Supreme Court linked its judgment to a specific set of circumstances that are not present in this case. The Supreme Court's language and reasoning in that case do not preclude the Court of Federal Claims' illegal exaction doctrine from providing an adequate remedy in the circumstances of this case.

III.

Indeed the procedural background and facts of this case indicate that the Court of Federal Claims can supply an adequate remedy even without an explicit grant of prospective relief. Turning first to the facts of this case, Con Ed's district court complaint seeks a prospective injunction on its future payments of money under EPACT. In the event of success in its claims before the Court of Federal Claims, Con Ed will receive a refund of all payments under EPACT because the United States illegally exacted those funds. In the face of such a judgment, the United States could not proceed to assess further EPACT payments without again illegally exacting funds. *Res judicata* principles would require immediate refund of any assessment with interest. *See Foster v. Hallco Mfg. Co., Inc.*, 947 F.2d 469, 475-76 (Fed. Cir. 1991) ("The principles of law denominated '*res judicata*' embody the public policy of putting an end to litigation."). Moreover, this court cannot imagine that the United States would continue to require the utility companies to pay unlawful exactions.

In sum, Con Ed's district court case in reality seeks only prospective monetary relief. Con Ed's case for retrospective monetary relief before the Court of Federal Claims overlaps with its claims for prospective monetary relief before the district court. Relief from its retrospective obligations will also relieve it from the same obligations prospectively. In this case, without the complexities of the ongoing federal-state relationships present in *Bowen*, a money judgment in the Court of Federal Claims will provide Con Ed with an adequate remedy against the same exactions in the future.

See, e.g., *Kanemoto*, 41 F.3d at 645 ("[A] 'naked money judgment' would provide Kanemoto an adequate remedy.").

The procedural background of this case seals the conclusion that Con Ed has an adequate remedy in the Court of Federal Claims. Con Ed originally sued in the Court of Federal Claims seeking a refund of payments made under EPACT, asserting many of the same constitutional claims it asserts before the district court. After initial successes, the utility companies' cases took a turn against its position. *Yankee Atomic*, 112 F.3d at 1571. Only at that late stage of the litigation did Con Ed file this suit in district court deleting all reference to monetary recovery and instead seeking a declaratory judgment and an injunction.

This court and its sister circuits will not tolerate a litigant's attempt to artfully recast its complaint to circumvent the jurisdiction of the Court of Federal Claims. *Veda, Inc. v. United States Dep't of Air Force*, 111 F.3d 37, 39 (6th Cir. 1997) (citing *A.E. Finley Assoc., Inc. v. United States*, 898 F.2d 1165, 1167 (6th Cir. 1990) ("[O]ne cannot circumvent exclusive jurisdiction in the Claims Court by suing simply for declaratory or injunctive relief in a case where such relief would be the equivalent of a judgment for money damages.")); *Marshall Leasing, Inc. v. United States*, 893 F.2d 1096, 1099 (9th Cir. 1990); *Eagle-Picher Indus., Inc. v. United States*, 901 F.2d 1530, 1532 (10th Cir. 1990) (quoting *Rogers v. Ink*, 766 F.2d 430, 434 (10th Cir. 1985) ("A party may not circumvent the Claims Court's exclusive jurisdiction by framing a complaint in the district court as one seeking injunctive, declaratory or mandatory relief where the thrust of the suit is to obtain money from the United

States.")); *see also Am. Sci. Eng'g., Inc. v. Califano*, 571 F.2d 58, 61-63 (1st Cir. 1978); *Ala. Rural Fire Ins. Co. v. Naylor*, 530 F.2d 1221, 1225-26 (5th Cir. 1976). The circuits have consistently rebuffed such blatant forum shopping to avoid adequate remedies in an alternative forum. *Id.*

Every legal issue that Con Ed seeks to resolve in this district court case could be (and, in some cases, has been) decided in a suit before the Court of Federal Claims. Likewise, as evidenced by the previously filed Court of Federal Claims litigations, a refund of the EPACT payments could provide an adequate remedy for Con Ed and other utilities. Moreover, a decision by the Court of Federal Claims would effectively moot any prospective relief that the district court could afford. Accordingly, the Court of Federal Claims can supply an "adequate remedy" to prevent the constitutional wrongs alleged by Con Ed. Therefore, under § 704, an adequate remedy in the Court of Federal Claims deprives Con Ed of duplicative district court adjudication.

CONCLUSION

Because § 704's exception for alternative adequate remedies forecloses a waiver of immunity under § 702 in this case, the district court erred in denying the Government's motion to transfer to the Court of Federal Claims. This court returns this case to the district court with directions to transfer.

COSTS

Each party shall bear its own costs.

REVERSED AND REMANDED.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

99-1464

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., NEW YORK POWER AUTHORITY, NIAGARA MOHAWK POWER CORPORATION, ROCHESTER GAS AND ELECTRIC CORPORATION, ARIZONA PUBLIC SERVICE CORPORATION, COMMONWEALTH EDISON COMPANY, DUKE ENERGY CORPORATION, ENTERGY GULF STATES, INC., FLORIDA POWER CORPORATION, FLORIDA POWER AND LIGHT COMPANY, GPU NUCLEAR, INC. (on behalf of Jersey Central Power & Light Company, Metropolitan Edison Company, and Pennsylvania Electric Company), INDIANA MICHIGAN POWER COMPANY, NEBRASKA PUBLIC POWER DISTRICT, PECO ENERGY COMPANY, SOUTHERN CALIFORNIA EDISON COMPANY, SOUTHERN NUCLEAR OPERATING COMPANY, INC., SYSTEM FUELS, INC., TEXAS UTILITIES ELECTRIC COMPANY, VIRGINIA ELECTRIC & POWER COMPANY, WASHINGTON PUBLIC POWER SUPPLY SYSTEM, WISCONSIN PUBLIC SERVICE CORPORATION, and WOLF CREEK NUCLEAR OPERATING CORPORATION (on behalf of Kansas City Power & Light Company, Kansas Electric Power Cooperative, Inc., and Kansas Gas and Electric Company),

Plaintiffs-Appellees,

v.

Appendix A

UNITED STATES, DEPARTMENT OF ENERGY, DEPARTMENT OF ENERGY AS SUCCESSOR TO THE UNITED STATES ATOMIC ENERGY COMMISSION, and ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION,

Defendants-Appellants.

PLAGER, Senior Circuit Judge,* concurring.

This case confronts the court with a choice between a seemingly illogical Supreme Court rule, calling for a less-than-sensible result, on the one hand, or under-ruling the Supreme Court decision, here *Bowen v. Massachusetts*, 487 U.S. 879 (1988), on the other. This time the court has chosen the latter course. I cannot disagree; it remains to be seen whether the Supreme Court will.

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* Judge Plager assumed senior status on November 30, 2000.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

99-1464

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., NEW YORK POWER AUTHORITY, NIAGARA MOHAWK POWER CORPORATION, ROCHESTER GAS AND ELECTRIC CORPORATION, ARIZONA PUBLIC SERVICE CORPORATION, COMMONWEALTH EDISON COMPANY, DUKE ENERGY CORPORATION, ENTERGY GULF STATES, INC., FLORIDA POWER CORPORATION, FLORIDA POWER AND LIGHT COMPANY, GPU NUCLEAR, INC. (on behalf of Jersey Central Power & Light Company, Metropolitan Edison Company, and Pennsylvania Electric Company), INDIANA MICHIGAN POWER COMPANY, NEBRASKA PUBLIC POWER DISTRICT, PECO ENERGY COMPANY, SOUTHERN CALIFORNIA EDISON COMPANY, SOUTHERN NUCLEAR OPERATING COMPANY, INC., SYSTEM FUELS, INC., TEXAS UTILITIES ELECTRIC COMPANY, VIRGINIA ELECTRIC & POWER COMPANY, WASHINGTON PUBLIC POWER SUPPLY SYSTEM, WISCONSIN PUBLIC SERVICE CORPORATION, and WOLF CREEK NUCLEAR OPERATING CORPORATION (on behalf of Kansas City Power & Light Company, Kansas Electric Power Cooperative, Inc., and Kansas Gas and Electric Company),

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Appendix A

UNITED STATES, DEPARTMENT OF ENERGY, DEPARTMENT OF ENERGY AS SUCCESSOR TO THE UNITED STATES ATOMIC ENERGY COMMISSION, and ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION,

Defendants-Appellants..

ORDER

The Appellants filed a combined petition for rehearing and rehearing en banc. A response thereto was invited by the court, and filed by the Appellees. The petition for rehearing and response were referred to the panel that heard the appeal, and thereafter, the petition for rehearing en banc and response were referred to the circuit judges who are in regular active service. A poll having been taken, it is

ORDERED that the petition for rehearing en banc was granted; the judgment of the court entered on December 5, 2000, and reported at 234 F.3d 642 (Fed. Cir. 2000), is hereby vacated; and the opinion of the court accompanying the judgment is withdrawn.

The en banc court returned this appeal to the merits panel, who issue the revised opinion that accompanies this order.

FOR THE COURT,

May 3, 2001
Date

s/ Jan Horbaly
Jan Horbaly
Clerk

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DATED AND DECIDED DECEMBER 5, 2000

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

99-1464

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., NEW YORK POWER AUTHORITY, NIAGARA MOHAWK POWER CORPORATION, ROCHESTER GAS AND ELECTRIC CORPORATION, ARIZONA PUBLIC SERVICE CORPORATION, COMMONWEALTH EDISON COMPANY, DUKE ENERGY CORPORATION, ENERGY GULF STATES, INC., FLORIDA POWER CORPORATION, FLORIDA POWER AND LIGHT COMPANY, GPU NUCLEAR, INC. (on behalf of Jersey Central Power & Light Company, Metropolitan Edison Company, and Pennsylvania Electric Company), INDIANA MICHIGAN POWER COMPANY, NEBRASKA PUBLIC POWER DISTRICT, PECO ENERGY COMPANY, SOUTHERN CALIFORNIA EDISON COMPANY, SOUTHERN NUCLEAR OPERATING COMPANY, INC., SYSTEM FUELS, INC., TEXAS UTILITIES ELECTRIC COMPANY, VIRGINIA ELECTRIC & POWER COMPANY, WASHINGTON PUBLIC POWER SUPPLY SYSTEM, WISCONSIN PUBLIC SERVICE CORPORATION, and WOLF CREEK NUCLEAR OPERATING CORPORATION (on behalf of Kansas City Power & Light Company, Kansas Electric Power Cooperative, Inc., and Kansas Gas and Electric Company),

Plaintiffs-Appellees,

v.

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UNITED STATES, DEPARTMENT OF ENERGY, DEPARTMENT OF ENERGY AS SUCCESSOR TO THE UNITED STATES ATOMIC ENERGY COMMISSION, and ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION,

Defendants-Appellants.

* * *

Appealed from: United States District Court for the Southern District of New York

Senior Judge Whitman Knapp

* * *

DECIDED: December 5, 2000

Before RADER, *Circuit Judge*, PLAGER, *Senior Circuit Judge*,* and GAJARSA, *Circuit Judge*.

Opinion for the court filed by *Circuit Judge* RADER. Dissenting opinion filed by *Circuit Judge* GAJARSA.

RADER, *Circuit Judge*.

Consolidated Edison Company of New York and twenty-one other nuclear utilities (collectively, Con Ed) sued the United States, the Department of Energy, and the Energy

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* Judge Plager assumed senior status on November 30, 2000.

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Research and Development Administration (collectively, the Government) in the United States District Court for the Southern District of New York seeking declaratory judgments and injunctive relief. *Consolidated Edison Co. v. United States*, 45 F. Supp. 2d 331 (S.D.N.Y. 1999). Con Ed's suit challenged the constitutionality of the Energy Policy Act of 1992 (EPACT), 42 U.S.C. § 2297(g) (1994), on due process and takings grounds. The district court denied the Government's motion to transfer the case to the United States Court of Federal Claims, or alternatively to dismiss. Because the district court correctly denied the Government's motion, this court affirms.

I.

Con Ed sued the Government, challenging the constitutionality of EPACT. Before enactment of EPACT, Con Ed contracted with the Government for uranium enrichment services under a series of fixed-price agreements. After enactment of EPACT in 1992, the Government began decontaminating and decommissioning several of its uranium processing facilities. EPACT stipulated that the Government would pay sixty-eight percent of the decontamination and decommissioning costs and that annual assessments on domestic nuclear utilities would supply the remaining thirty-two percent. EPACT made the Department of Energy responsible for computing each utility's share of the assessment in proportion to that utility's use of Government enrichment services in the past. *See* 42 U.S.C. § 2297g-1(c).

After making initial payments under EPACT, Con Ed, and other nuclear utilities not parties to this suit, sued the

Government in the Court of Federal Claims seeking refunds of those payments. The Court of Federal Claims lawsuits asserted many of the same constitutional grounds as this lawsuit. In one such case, this court reversed the Court of Federal Claims' grant of summary judgment in favor of a nuclear utility, concluding that collection of the assessments under EPACT was not unconstitutional as applied. *Yankee Atomic Elec. Co. v. United States*, 112 F.3d 1569, 1571 (Fed. Cir. 1997), *cert. denied*, 118 S. Ct. 2365 (1998).

After several subsequent nuclear utility losses in the Court of Federal Claims, Con Ed filed this suit in the district court. Instead of seeking refunds of assessments paid, however, Con Ed sought declaratory judgment that EPACT is unconstitutional on several grounds and an injunction on enforcement of the EPACT assessments. By taking this procedural posture, Con Ed sought a hearing in another forum. To achieve this objective, Con Ed carefully drew its complaint to avoid prayers for relief actionable in the Court of Federal Claims, such as claims against the United States for money damages. *See* 5 U.S.C. § 702 (1994).

The Government moved the district court to transfer this case to the Court of Federal Claims, where other nuclear utility cases await disposition. The district court denied that motion. The district court noted that the United States Court of Appeals for the Second Circuit and the United States Supreme Court have confirmed that the Administrative Procedure Act (APA) waives the sovereign immunity of the United States for suits that properly invoke equitable relief from agency action. *Bowen v. Mass.*, 487 U.S. 879, 904 (1988); *In re Chateaugay Corp.*, 53 F.3d 478, 493 (2d Cir.

1995). After denying the Government's motion, the district court certified the jurisdictional question for interlocutory review.

II.

The sole question in this case is whether the APA waives sovereign immunity for an action in a district court on the merits of Con Ed's claim because its complaint seeks equitable relief outside the Court of Federal Claims' statutory grant of authority. This court reviews legal questions, such as jurisdiction and authority of the Court of Federal Claims and the district court, without deference. *Terran v. Sec'y of Health & Human Servs.*, 195 F.3d 1302, 1309 (Fed. Cir. 1999).

The Government contends that Con Ed's suit in the district court under the APA amounts to impermissible forum shopping. The APA, according to the Government, does not waive sovereign immunity for this suit in the district court because Con Ed can obtain full legal relief, if successful, in the Court of Federal Claims. Specifically, the Government notes that the Court of Federal Claims has, on occasion, asserted power under the Tucker Act to order a full refund of illegally exacted funds. *See* 28 U.S.C. § 1491(a)(1) (1994); *New York Life Ins. Co. v. United States*, 118 F.3d 1553, 1554 (Fed. Cir. 1997). Thus, if Con Ed can show illegal exaction of EPACT assessments, the Government maintains, the Court of Federal Claims may have authority to order a refund. Indeed, the Government explains that such suits are already pending in the Court of Federal Claims.

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Predicting and attempting to preempt Con Ed's response, the Government discounts the Court of Federal Claim's lack of power to order injunctive or other prospective relief. If the EPACT assessments in fact violate constitutional guarantees, the Government asserts, injunctive relief would not be necessary. Rather, *res judicata* would implicitly bar the Government from assessing Con Ed under EPACT in the future in the face of a Court of Federal Claims illegal exaction judgment. Alternatively, the Government makes a "trust me" argument, explaining that it "would not be so unwise as to require" Con Ed to assert *res judicata* by making future assessments after a loss in the Court of Federal Claims.

This district court case does warrant the Government's "forum shopping" characterization. However, while forum shopping is generally disfavored, *see Hanna v. Plumer*, 380 U.S. 460, 468 (1965), jurisdictional anomalies may permit forum shopping, *see In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1157 (5th Cir. 1987) (vacated on other grounds) ("After all, the purpose of diversity jurisdiction is to *allow* a certain kind of forum-shopping."). This case presents such an instance, where the federal code tolerates a variety of forum shopping. Although the operative facts of Con Ed's case in the Court of Federal Claims are nearly the same as in its case in the district court, the Supreme Court has explained that a litigant may invoke the APA as a waiver of sovereign immunity for prospective equitable relief because such relief is not within the jurisdiction of the Court of Federal Claims. *Bowen*, 487 U.S. at 904. Thus, depending on the relief sought — a refund of illegal exactions under the Tucker Act or an injunction under the APA — jurisdiction may lie either in the Court of Federal Claims, *see Transohio*

Sav. Bank v. Director, OTS, 967 F.2d 598, 606 (D.C. Cir. 1992), or in the district courts, *see Bowen*, 487 U.S. at 904.

III.

The APA waives sovereign immunity for actions challenging agency actions in district court. Section 702 provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. . . . Nothing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 702. In *Bowen*, the Supreme Court explains that section 702 "eliminat[es] the defense of sovereign immunity in cases covered by [§ 702]." *Bowen*, 487 U.S. at 892. The Court further notes: "It is common ground that if review is proper under the APA, the District Court had jurisdiction under 28 U.S.C. § 1331 [the federal question statute]." *Id.* at 892 n.16. Indeed, in this case, Con Ed properly cites

28 U.S.C. §§ 1331 (federal question statute), 1361 (the mandamus statute), and 2201-02 (1994) (the declaratory judgment statute) to show subject matter jurisdiction for its claim for equitable relief.

Thus, the question in this case narrows to whether § 702 of the APA waives sovereign immunity for a suit in a district court for the relief requested. Stated in other terms, does the APA waive immunity for the relief sought by Con Ed in this case? Relevant to that question, section 702 of the APA does not waive sovereign immunity for money damages claims or for claims that seek remedies "expressly or impliedly" precluded by other statutes. 5 U.S.C. § 702; *Transohio*, 967 F.2d at 607. Section 704 of the APA further excludes from the APA's sovereign immunity waiver those claims for which adequate remedies are elsewhere available. 5 U.S.C. § 704 (1994); *Transohio*, 967 F.2d at 607. Section 704 states:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.

5 U.S.C. § 704. Read together, sections 702 and 704 limit the APA's waiver of sovereign immunity. In sum, the APA authorizes suits against the Government, other than for money damages, to redress final agency actions not otherwise addressable under federal statutes. *Bowen*, 487 U.S. at 903 ("When Congress enacted the APA to provide a general authorization for review of agency action in the district courts, it did not intend that general grant of jurisdiction to duplicate the previously established special statutory procedures relating to specific agencies.").

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The Supreme Court's *Bowen* decision exemplifies the operation of these APA provisions in a setting similar to this case. In *Bowen,* the Commonwealth of Massachusetts sought review of a final order of the Secretary of Health and Human Services refusing to reimburse a category of Medicaid expenses. *Bowen*, 487 U.S. at 882. The Supreme Court gave two reasons why § 702's exclusion for money damages claims did not foreclose judicial review: First, Massachusetts' complaints "sought declaratory and injunctive relief . . . not . . . money damages." *Id.* at 893. Second, "[n]either a disallowance decision, nor the reversal of a disallowance decision, is properly characterized as an award of 'damages.' " *Id.* Thus, in *Bowen*, Massachusetts did not seek relief in the form of monetary damages, which would have placed its claim outside the terms of the waiver in § 702.

In this case, Con Ed, like the Commonwealth of Massachusetts in *Bowen*, seeks declaratory and prospective injunctive relief from allegedly unconstitutional EPACT assessments, not money damages. This prayer for relief satisfies the first issue in the *Bowen* reasoning because Con Ed does not seek the recovery of funds at all, but only an injunction on future EPACT assessments. Likewise, Con Ed's suit also falls within *Bowen's* second reason for evading the money damages obstacle to an APA waiver because Con Ed's prayer for an injunction on future EPACT assessments cannot be properly characterized as a request for an award of damages. Even assuming that Con Ed sought return of its paid assessments in the district court, its claims would not register as "money damages." In the words of the Supreme Court:

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> Our cases have long recognized the distinction between an action at law for damages — which are intended to provide a victim with monetary compensation for an injury to his person, property or reputation — and an equitable action for specific relief — which may include . . . "the recovery of specific property *or monies*, ejectment from land, or injunction either directing or restraining the defendant officer's actions."

Bowen, 487 U.S. at 893 (italics in original). Thus Con Ed's prayer for relief might even hypothetically have sought return of money without falling within the excluded category of "money damages." However, Con Ed does not seek money at all. Con Ed's prayer for specific relief from the EPACT assessments in this case does not fall within the Supreme Court's definition of money damages.

Having evaded the money damages exclusion within § 702, Con Ed still must show that § 704 does not withdraw the waiver of sovereign immunity granted by § 702. Section 704 codifies a requirement ensuring that the general grant of review in the APA does not "duplicate existing procedures for review of agency action." *Bowen*, 487 U.S. at 903. In effect, § 704 withdraws the limited waiver of immunity in § 702 if an adequate judicial remedy is already available elsewhere. 5 U.S.C. § 704. In this case, this court must examine whether the Court of Federal Claims supplies an "adequate remedy" to prevent the constitutional wrongs alleged by Con Ed. If the Court of Federal Claims supplies an "adequate remedy," then Con Ed's cause of action would fall within an exception to the APA's waiver of sovereign immunity.

The Supreme Court confronted this issue in *Bowen*. The Court determined that the Court of Federal Claims cannot supply an "adequate remedy" in a case seeking injunctive relief:

> The [Government] argues that § 704 should be construed to bar review of the agency action in the District Court because monetary relief against the United States is available in the Claims Court under the Tucker Act. This restrictive — and unprecedented — interpretation of § 704 should be rejected because the remedy available to the [plaintiff] in the Claims Court is plainly not the kind of "special and adequate review procedure" that will oust a district court of its normal jurisdiction under the APA.

Bowen, 487 U.S. at 904. For the reasons stated in *Bowen*, the Court of Federal Claims cannot supply an adequate remedy for Con Ed's suit either. As this passage from *Bowen* indicates, district court action under the APA is the normal default rule, negated only by special and adequate alternative review procedures. More to the point, however, Con Ed seeks prospective injunctive relief. Indeed, the Supreme Court — noting that the *Bowen* plaintiff might have chosen to bring suit in the Court of Federal Claims — explained:

> The Claims Court does not have the general equitable powers of a district court to grant prospective relief. . . . We are not willing to assume, categorically, that a naked money judgment against the United States will always be an

> adequate substitute for prospective relief fashioned in the light of the rather complex ongoing relationship between the parties.

Bowen, 487 U.S. at 905. In this case, as in *Bowen*, the Court of Federal Claims has no jurisdiction beyond award of a "naked money judgment." This case also features a complex ongoing relationship to decontaminate and decommission nuclear facilities. EPACT itself involves computations based on past use of Government enrichment services and ongoing obligations to share decommissioning expenses. In this complex ongoing relationship, this court, like the Supreme Court in *Bowen*, cannot be sure that a money judgment will adequately substitute for prospective relief. Prospective relief, such as sought in this case, lies beyond the powers of the Court of Federal Claims. In direct terms, claims for money damages before the Court of Federal Claims do not supply an "adequate remedy" for a claim for equitable relief in this complex case.

It is important to keep in mind that the question before us is not whether plaintiffs are entitled to the remedy they seek, but only whether the district court is empowered to give them a hearing. The dissent recognizes that the answer to that question lies in how we understand the Supreme Court's *Bowen* decision. Though the dissent attempts to distinguish *Bowen* on its facts, the facts are that, like *Bowen*, this case involves not a one-shot contract to be performed or not, but an ongoing legal and contractual relationship between the plaintiffs and the federal government with a complex of duties and responsibilities, one of which is challenged by the Government's insistence that payments are due on a basis different from that understood by the plaintiffs.

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The dissent appreciates that the case turns on *Bowen's* holding that a suit in the Court of Federal Claims for money damages to recover past payments is not necessarily an "adequate remedy" under APA § 704 when a plaintiff seeks declaratory and injunctive relief against future assessments. The dissent makes its case for the opposite rule by quoting at length from Justice Scalia's dissent in *Bowen*, and asserting that "the logic promulgated by the dissent in *Bowen* is persuasive" (slip op. at 13) — thus candidly acknowledging that the position the dissent here calls for is indeed one of dissent.

There are good arguments for the rule the dissenters prefer. Among others, it would reduce the potential for this kind of litigation over where to litigate, a consequence of our system of federal courts with divided and sometimes overlapping jurisdiction. Indeed, in the fullness of time it may well be that the rule announced by the Supreme Court in *Bowen* will prove so unworkable that the Court will choose to change it.[1] If so, we will have one less area of indeterminate jurisdictional line-drawing, and plaintiffs will be precluded from doing the kind of forum shopping they did here.

However, this court does not possess any special authority over the law governing this case, as it has in the intellectual property field, *see Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 40 (1997). We have

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1. Two other Justices, Chief Justice Rehnquist and Justice Kennedy, joined Justice Scalia's dissent. Whether the change in the makeup of the Court since *Bowen* will, in the future, convert the dissent into a majority is a matter beyond speculation by lower court judges.

the Supreme Court misinformed about its view of federal jurisdiction. Accordingly, this court is bound to follow, as best it can, the guidance given it by the majority in *Bowen* and not that of the dissent, and to recognize the difference.

CONCLUSION

Because neither § 702's exclusion for money damages nor § 704's exception for alternative adequate remedies foreclose the APA's waiver of immunity in this case, the district court correctly determined that it was authorized to proceed under the APA. The district court correctly denied the Government's motion to transfer to the Court of Federal Claims; the matter is returned to the trial court for continued proceedings.

COSTS

Each party shall bear its own costs.

AFFIRMED.

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

99-1464

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., NEW YORK POWER AUTHORITY, NIAGARA MOHAWK POWER CORPORATION, ROCHESTER GAS AND ELECTRIC CORPORATION, ARIZONA PUBLIC SERVICE CORPORATION, COMMONWEALTH EDISON COMPANY, DUKE ENERGY CORPORATION, ENERGY GULF STATES, INC., FLORIDA POWER CORPORATION, FLORIDA POWER AND LIGHT COMPANY, GPU NUCLEAR, INC. (on behalf of Jersey Central Power & Light Company, Metropolitan Edison Company, and Pennsylvania Electric Company), INDIANA MICHIGAN POWER COMPANY, NEBRASKA PUBLIC POWER DISTRICT, PECO ENERGY COMPANY, SOUTHERN CALIFORNIA EDISON COMPANY, SOUTHERN NUCLEAR OPERATING COMPANY, INC., SYSTEM FUELS, INC., TEXAS UTILITIES ELECTRIC COMPANY, VIRGINIA ELECTRIC & POWER COMPANY, WASHINGTON PUBLIC POWER SUPPLY SYSTEM, WISCONSIN PUBLIC SERVICE CORPORATION, and WOLF CREEK NUCLEAR OPERATING CORPORATION (on behalf of Kansas City Power & Light Company, Kansas Electric Power Cooperative, Inc., and Kansas Gas and Electric Company),

Plaintiffs-Appellees,

v.

Appendix B

UNITED STATES, DEPARTMENT OF ENERGY, DEPARTMENT OF ENERGY AS SUCCESSOR TO THE UNITED STATES ATOMIC ENERGY COMMISSIO., d ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION,

Defendants-Appellants.

GAJARSA, *Circuit Judge*, dissenting.

I respectfully dissent from the majority opinion for two reasons. First, I believe that the majority's analysis is in direct conflict with Supreme Court precedent, precedent of this court, and the statutory scheme promulgated by Congress, which provides for judicial review pursuant to the Administrative Procedure Act only when no other adequate remedy is available. Second, the majority opinion allows the plaintiffs an opportunity to collaterally attack a clear and controlling precedent of this court and moreover it frustrates the legislative purpose of the Tucker Act.

Specifically, under the rubric of affording Con Ed an opportunity to seek equitable relief, the majority opinion countenances an end run around the Tucker Act by expanding the government's limited waiver of sovereign immunity far beyond its statutory constraints. The majority reaches its conclusion by linking a truism — that the Court of Federal Claims ("CFC") cannot issue injunctions — with a *non sequitur* — that the CFC cannot otherwise provide Con Ed effective relief. The majority opinion condones the plaintiffs' forum shopping by permitting the twenty-two plaintiffs to avoid the jurisdiction of the CFC where they

have submitted the same claims on overlapping and similar legal theories that have been rejected by this court in *Yankee Atomic Electric Co. v. United States*, 112 F.3d 1569 (Fed. Cir. 1997). The majority rationalizes the concept of forum shopping on the premise that "the federal code tolerates a variety of forum shopping." This case certainly does not present such an instance.

This circuitous journey begins with Congress' recognition in the late 1980's that the government's uranium facilities would have to be decontaminated and decommissioned. It was estimated that the total cost of the clean up would exceed $20 billion over a period of forty years. In response to the clean up requirement Congress enacted the Energy Policy Act of 1992 ("EPACT"). 42 U.S.C. §§ 2297(g) et seq. (1994 & Supp. 2000). The EPACT created the Uranium Enrichment Decontamination and Decommissioning Fund ("Fund"). The Fund accumulated monies by assessing a charge to domestic utility companies that purchased and used the enrichment services and from public funds to be appropriated by Congress. The EPACT also limited the collection of funds from the domestic utilities after the earlier of 15 years after October 24, 1992 or the collection of $2.25 billion (adjusted for inflation). *See* § 2297g-1(e). The EPACT imposed the special assessment on each domestic utility that had benefited from the government's enrichment services. It further provided that the domestic utilities could pass this cost through to the consumers by treating the special assessment as "a necessary and reasonable current cost of fuel, which shall be fully recoverable in rates in all jurisdictions in the same manner as the utility's other fuel cost." § 2297g-1(g).

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The government has annually billed the domestic utilities since October, 1992 for their pro-rata share of the special assessment. After paying the special assessments, the domestic utilities challenged the assessment in the CFC, requesting a reimbursement of monies paid alleging that the special assessment breached their contracts with the federal government by retroactively increasing the cost of the uranium enrichment services and that it constituted an illegal exaction — a taking in violation of the Takings Clause of the Fifth Amendment. The CFC, in one of the cases then pending, held that the special assessment was an illegal exaction under the Takings Clause and granted the plaintiff a money judgment. *Yankee Atomic Electric Co. v. United States*, 33 Fed. Cl. 580 (1995). On appeal, however, this court in *Yankee Atomic Electric Co. v. United States*, 112 F.3d 1569, reversed the CFC's finding that the Act was "a general exercise of Congress' taxing power for the purpose of addressing a societal problem rather than an act that retroactively increases the price charged to contracting parties for uranium enrichment services." *Yankee Atomic*, 112 F.3d at 1577. Basically, this court held that the special assessment did not breach any contract rights and *Yankee Atomic* had no property right that had been taken by the assessment.

The Supreme Court denied *certiorari*, *Yankee Atomic Electric Co. v. United States*, 524 U.S. 951 (1998), whereupon the remaining plaintiffs, understanding their predicament, forged a new theory as a collateral attack against the *Yankee Atomic* legal roadblock and the EPACT. Having followed one avenue that they originally believed to be correct, but which proved to be futile, they now adopt

similar and overlapping legal theories buttressed by their request of alternative remedies. They now seek a declaratory judgment and injunctive relief in the United States District Court for the Southern District of New York. This appeal is the positive result obtained by the plaintiffs in their forum shopping quest to obtain alternative relief on substantially the same legal premises. The utility companies, plaintiffs below, sought a declaratory judgment that the special assessment: (1) constitutes a taking of a vested property interest by their fixed price contracts with the federal government without just compensation under the Fifth Amendment (Takings) (Count I); (2) violates the Due Process Clause of the Fifth Amendment because the assessment is irrational and arbitrary, abrogates the plaintiffs' due process right to receive enrichment services at the contractually specified prices and unfairly imposed retroactive liability on the plaintiffs for continuation that the plaintiffs did not create (Count II); (3) violates the Due Process Clause in that it constitutes an illegal, irrational, unfair and disproportionate tax imposed on an exceedingly narrow base and "unlawfully impairs" their rights under the contracts and settlement agreements with the government (Count III); and (4) violates their fixed price contracts and Settlement agreement with the government for enrichment services by retroactively imposing additional costs based on the use of those services (Counts IV-VI).[1] The plaintiffs have not specifically requested monetary damages from the federal district court but have sought to enjoin the government from collecting

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1. These allegations are the same as the plaintiffs' amended complaint filed in the CFC in the parallel cases. *See Commonwealth Edison Co. v. United States*, 46 Fed. Cl. 29, 35 (2000), appeal pending _____.

additional monies under the special assessment provisions and to bar enforcement of these provisions. The issue before the court is whether the relief sought is akin to an action in damages. This action cannot be so camouflaged to be anything but an action for damages.[2]

The government argued that all of the CFC's actions arise out of the "same series of transactions, facts and circumstances" as the case filed at the federal district court and the case should not proceed simultaneously in both forums. The federal district court rejected the government's motion to stay the proceedings in favor of the CFC proceedings, holding that the plaintiffs could not obtain injunctive relief from the CFC so as to escape the continuing obligation to make payments into the Fund. *Consolidated Edison Co. of N.Y. v. United States*, 30 F.Supp.2d 385 (S.D.N.Y. 1998). The government then moved the court to transfer the plaintiffs' case to the CFC pursuant to 28 U.S.C. § 1631. The decision on interlocutory appeal before us is the federal district court's denial of that motion. *Consolidated Edison Co. of N.Y. v. United States*, 1999 WL 212686 (S.D.N.Y. Apr. 12, 1999).

The district court's holding denying the government's motion to transfer relied on *In re Chateaugay Corp.*, 53 F.3d 478 (2d Cir. 1995) and *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), reasoning that where the challenge is solely for the taking of money (i.e., compelled payments) Congress could not have intended to relegate such a suit to the Tucker Act because the "just compensation" for such a taking is

2. If it quacks like a duck, waddles like a duck, struts like a duck, it must be a duck.

simply a "dollar for each dollar" taken.[3] The district court also rejected the government's position that the plaintiffs only sought money damages barred by Section 702 of the APA holding that the utilities only sought prospective relief. Furthermore, it concluded that under the "adequate remedy" provisions of Section 704 of the APA the CFC could not have jurisdiction over the plaintiffs' due process claims; moreover, the CFC could not grant equitable relief. The plaintiffs in the case before the district court alleged that they had paid six special assessments to the Fund totaling $569 million, but they did not make a demand for a refund of the payments as part of their prayer for relief.[4]

The majority opinion falls into the same open logic pit, which swallows the reasoning of the district court. First, it ignores the fact that the district court premised its jurisdictional argument on the basis that the CFC could not address the plaintiffs' due process claims. This is error. In fact, in the context of the so-called "illegal exaction"

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3. It should be noted that the majority at least has not pursued the same legal reasoning as the federal district court. It has not premised its conclusions on either *Chateaugay* or *Eastern Enterprises*, recognizing perhaps the limitations of those decisions in establishing the legal support for their conclusions since in both of those cases no monies were paid to the respective funds prior to the declaratory and injunctive relief actions being filed.

4. Does this failure imply that the plaintiffs have forsaken the recovery of past payments, namely the $569 million previously paid, or will they continue to pursue the past amounts if they obtain a favorable interpretation of the EPACT before the Southern District and the Second Circuit? Will the CFC be bound by that ruling or by our *Yankee Atomic* decision in their continuing challenge?

doctrine, enunciated most prominently in *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967), the CFC does have jurisdiction to consider due process claims. *See Mallow v. United States*, 161 Ct. Cl. 446 (1963). *See also Commonwealth Edison*, 46 Fed. Cl. at 42-43 (2000) (discussing additional cases). Second, instead of focusing on whether the CFC can provide the plaintiffs an adequate remedy, the majority opinion focuses on whether or not the CFC can enjoin the federal government from collecting any future payments from the plaintiffs. But this inquiry does not address the focal question posed by the APA, to wit, whether an adequate remedy is available in the CFC.

The plaintiffs' plain and underlying premise is to circumvent the binding precedent of this court established by *Yankee Atomic*. The majority states that "instead of seeking refunds of assessments paid," the plaintiffs have sought declaratory judgment that the EPACT is unconstitutional and seek an injunction on the enforcement of the special assessments. It concludes that the case "presents . . . [an] instance where the federal code tolerates a variety of forum shopping." However, the majority fails to recognize that it has opened a one-way forum shopping street. It allows a challenge by a plaintiff, who has failed to win before the Federal Circuit, to pursue an additional remedy by restructuring its complaint seeking declaratory judgment and injunctive relief. When the federal government fails before the Federal Circuit, it has no such remedy. For the government, this result constitutes a "tails you win, heads I lose" scenario in which the precedents of this court can be ignored by private litigants essentially at will. I do not believe that is what Congress intended.

Moreover, contrary to the majority's positing of the issue as one of whether the APA waived sovereign immunity for an action in the district court because the plaintiffs seek equitable relief, the real issue should be posed as whether or not the district court has subject matter jurisdiction to grant declaratory and injunctive relief to a party making a due process challenge to a government assessment, when the same party is concurrently suing the government in the CFC for a refund of money already paid? The question simply stated is whether the CFC can provide an adequate remedy; if so, this action is barred because the federal district court lacks jurisdiction. Despite the numerous cases littering the intersection of the Tucker Act and Section 704 of the APA, no clear answer has yet emerged. The majority opinion only adds to the cacophony.

The plaintiffs have cited 28 U.S.C. §§ 1331 and 1361 to show subject matter jurisdiction for their claim for equitable relief. However, federal question jurisdiction under 28 U.S.C. § 1331 does not by itself operate as a waiver of sovereign immunity. *See Kester v. Campbell*, 652 F.2d 13, 15 (9th Cir. 1981). The plaintiffs would need to identify an independent basis for the waiver of sovereign immunity to maintain their claim in the federal district court. The majority has found that waiver in Section 702 of the APA, 5 U.S.C. § 702. However, Section 702 is unavailing if there is an adequate remedy in a court that can provide appropriate relief.

In the instant case, given that plaintiffs have already paid some of the special assessments and have filed their claims for refunds in the CFC to recoup those payments, an adequate remedy exists for purposes of Section 704. A decision by

the CFC would effectively moot any prospective relief that the district court could afford. There are two possible scenarios. One, if the CFC upholds the lawfulness of the special assessments, then no lawful exaction exists from which prospective relief could be provided. Second, if the CFC holds the special assessment unconstitutional, then its decision would be binding and it is absurd to believe that the DOE would continue to require the domestic utilities to make payment of unlawful exactions. Moreover, it is reasonable to presume that the CFC, pursuant to its authority under 28 U.S.C. § 1491(a)(2), can provide appropriate prospective relief. As was stated by Justice Scalia in dissent:

> Respondent can assert immediately a claim for money damages in Claims Court, which if successful, will as effectively establish its right as would a declaratory judgment in district court. Since there is no allegation that the Secretary will not honor in the future a Claims Court judgment that would have not only precedential but collateral estoppel effect . . . the ability to bring an action in Claims Court with regard to disallowance decisions already made provides effective prospective relief as well.

Bowen v. Massachusetts, 487 U.S. 879, 926 (1988) (Scalia, J., dissenting).

By the plain language of its terms, Section 704 of the APA allows judicial review only when "there is no other adequate remedy in a court." *Bennett v. Spear*, 520 U.S. 154, 175 (1997). Section 704 provides that where agency action

is otherwise reviewable in a court and an adequate remedy is available in conjunction with that review, the APA's waiver of sovereign immunity under Section 702 is not available. *See Kanemoto v. Reno*, 41 F.3d 641, 644 (Fed. Cir. 1994); *Mitchell v. United States*, 930 F.2d 893, 895-96 (Fed. Cir. 1991).

The majority relies on *Bowen v. Massachusetts*, 487 U.S. 879, to establish the interplay of Section 702 and 704 and parallels the present case with *Bowen*; however, *Bowen* is clearly distinguishable on its facts and the majority's reliance on *Bowen* is misplaced. In *Bowen*, the Commonwealth of Massachusetts brought suit to reverse a federal agency's refusal to reimburse the state for certain categories of Medicaid expenditures. *Bowen*, 487 U.S. at 886-87. Pursuant to the Medicaid program, the federal government made quarterly advance payments to the state in anticipation of the future reimbursable costs of the state's program. When the state was notified by the Secretary of Health and Human Services ("HHS") that certain of its claimed expenditures had been disallowed, the state brought suit in the federal district court requesting declaratory and injunctive relief setting aside the Secretary's decision. The United States challenged the district court's jurisdiction to hear the case contending that the Tucker Act provided exclusive jurisdiction for the suit in the Court of Federal Claims (previously the U.S. Claims Court). *Id.* at 890.

The Supreme Court discussed the term "money damages" as used in the APA, 5 U.S.C. § 702:

> The term "money damages," we think, normally refers to a sum of money used as compensatory

> relief. Damages are given to the plaintiff to substitute for a suffered loss, whereas specific remedies are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled. Thus, while in many instances an award of money is an award of damages, [o]ccasionally a money award is also a specie remedy. Courts frequently describe equitable actions for monetary relief under a contract in exactly those terms.

Bowen, 487 U.S. at 895 (citation omitted).

The Supreme Court further observed that "managing the relationships between the states and the federal government that occur over time and *involve constantly shifting balance sheets requires a different sort of review and relief process.*" (emphasis added). *Id.* at 905 n.39. The Court further noted that relevant statute created "complex questions" with "an intricate ongoing relationship" between the federal government and the State raised in Medicaid disallowance decisions. *Id.* at 901 n.31. Flowing from these observations, the Supreme Court determined that the district court properly had jurisdiction because the case presented issues for which a district court "would be in a better position to evaluate than a single tribunal." The Court then determined that the case was not one in which "a naked money judgment against the United States will always be an adequate remedy." *Id.* at 905.

The facts in the present case are drastically different than those in *Bowen*. Here, no constantly shifting balance sheet

or complex scheme exists; rather the amount that plaintiffs must pay is fixed and predetermined. Further, the only ongoing aspect of the EPACT is that money must be paid over a course of fifteen years instead of in one lump sum. Put differently, in the present case, unlike *Bowen*, the payment does not involve an amount that is dependent on constantly fluctuating multiple variables.

The majority also embraces the position that they are not determining whether or not the plaintiffs are entitled to the remedy they seek but only whether or not the district court has jurisdiction. However, in order to establish jurisdiction with the district court it had to determine first whether Section 702 waived sovereign immunity. It basically accepted the federal district court's interpretation of *Bowen*, holding that Section 702 waives immunity because the relief sought is equitable in nature. The Supreme Court, however, has instructed that the "*Bowen* analysis of § 702, ... did not turn on distinctions between 'equitable' actions and other actions," *Dep't. of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999). Specifically, the Supreme Court stated:

> As *Bowen* recognized, the crucial question under § 702 is not whether a particular claim for relief is "equitable" (a term found nowhere in § 702), but rather what Congress meant by "other than money damages" (the precise terms of § 702). *Bowen* held that Congress employed this language to distinguish between specific relief and compensatory, or substitute, relief.

Id. at 261.

Appendix B

The Supreme Court further explained that in *Bowen*:

> We held that the State's suit was not one "seeking money in compensation for the damage sustained by the failure of the Federal Government to pay as mandated; rather, it [was] a suit seeking to enforce the statutory mandate itself, which happens to be one for the payment of money."

Id. at 262.

Therefore, it is clear that the *Bowen* decision cannot be used as a predicate to grant jurisdiction to the federal district court in the case. It seems plain, that under the *Bowen* analysis, the plaintiffs' claim is precisely the type of suit that is properly before the Court of Federal Claims rather than the district court, because a "complex scheme" of federal interaction has not been raised. That is, "the district court is not in any better position to understand and evaluate the claim than a single tribunal." The dispute does not involve an "intricate ongoing relationship" between the parties and there is no need for prospective relief because an adequate remedy is available — money damages. As was stated by Justice Scalia in his dissent in *Bowen*: "If the jurisdictional division established by Congress [by § 702] is not to be reduced to an absurdity, the line between damages and specific relief must surely be drawn on the basis of the substance of the claim, and not its mere forum." *Id.* at 915. To put the answer bluntly, the plaintiffs are glorifying form over substance. We are allowing them to pursue another avenue to eventually obtain money damages from the federal government.

Moreover, the logic promulgated by the dissent in *Bowen* is persuasive. The majority surely could not have meant that the Tucker Act can be by-passed at will simply by rephrasing a complaint in declaratory judgment terms — something that could occur in virtually every case exactly as the parties did in this case. Many cases decided since *Bowen* have limited it basically to its facts; however, it has created and continues to generate much mischief. It is time that the Supreme Court apply the coup de grace to *Bowen*; otherwise courts will continue to be confused, like the majority in this case, and place many cases outside the jurisdiction of the CFC.

I would hold that the district court lacks jurisdiction under Section 702 because the CFC can provide an adequate remedy for purposes of Section 704.

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED APRIL 12, 1999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

98 Civ. 4155 (WK)

CONSOLIDATED EDISON COMPANY OF NEW YORK, et al.,

Plaintiffs,

– against –

UNITED STATES OF AMERICA, et al.,

Defendants.

OPINION & ORDER

WHITMAN KNAPP, SENIOR DISTRICT JUDGE

Plaintiffs seek declaratory and injunctive relief in challenging the constitutionality of certain provisions of the Energy Policy Act of 1992 ("EPACT"), 42 U.S.C. § 2297g, *et seq.* Defendants have moved, pursuant to 28 U.S.C. § 1631, for an order transferring this action to the United States Court of Federal Claims ("CFC") for consolidation with plaintiffs' claims in that court, or, in the alternative, dismissing this action for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. As

noted by defendants, upon the filing of a motion to transfer a case to the CFC, proceedings in the district court are statutorily stayed until sixty days after a decision on the motion. *See* 28 U.S.C. § 1292(d)(4)(B).

PROCEDURAL BACKGROUND

The factual background of this case is set forth in our Opinion and Order dated November 25, 1998, familiarity with which will be presumed. This action was commenced on June 12, 1998 and an amended complaint was filed on August 14. On August 17, the defendants moved, pursuant to Fed. R. Civ. P. 7(b)(1), for a stay pending the resolution of related actions commenced by each of the plaintiffs in the CFC. In an Opinion and Order of November 25, 1998, we denied that motion, but certified the question for interlocutory appeal. In denying the motion for a stay, we implicitly determined that we had subject matter jurisdiction, though we were not directly called upon to decide that issue.

Defendants did not avail themselves of the right to appeal, but on December 11 brought the instant motion to transfer or dismiss. Shortly thereafter, the plaintiffs brought a motion by order to show cause asking us to strike the instant motion, or, in the alternative, to lift the statutory stay so that discovery could proceed. At a hearing on December 23, we denied the plaintiffs' motion and directed plaintiffs to respond to the defendants' motion on the merits.

Defendants contend that plaintiffs' claims are barred by the doctrine of sovereign immunity and that plaintiffs' sole remedy is in the CFC. Defendants maintain that none of the

complaint's purported bases for district court jurisdiction, (1) federal question jurisdiction, 28 U.S.C. § 1331; (2) the mandamus statute, 28 U.S.C. § 1361; (3) the Declaratory Judgment Act, 28 U.S.C. § 2201-2202; and (4) the Administrative Procedure Act, 5 U.S.C. §§ 701 and 702, operate to waive the government's sovereign immunity. Plaintiffs respond by asserting that: (1) no waiver of sovereign immunity is required because district courts have subject matter jurisdiction to hear constitutional challenges to statutes; and (2) even if a waiver of sovereign immunity were required, § 702 of the Administrative Procedure Act provides for such a waiver in these circumstances. Thus, we now confront the jurisdictional question head-on.

DISCUSSION

In the motion at bar defendants have taken the position, as they did on their prior motion to stay, that 28 U.S.C. § 1491 ("the Tucker Act") mandates that plaintiffs' claims are properly considered only in the CFC and not in the district court. We must therefore examine whether plaintiffs' claims, which seek declaratory and injunctive relief, may be adjudicated in this forum.

A. Subject matter jurisdiction and sovereign immunity

The Second Circuit's decision in *In re Chateaugay Corp.* (2d Cir. 1995) 53 F.3d 478 convinces us that we retain subject matter jurisdiction over this action without regard to whether the government has waived sovereign immunity.

Chateaugay dealt with the question of who should pay the spiraling costs wrought by a series of benefits agreements

over many years between coal mine owners and their employees. The burden of funding the pensions and benefits of an "ever-greater" number of retirees was falling upon an "ever-smaller" number of mining companies. *Chateaugay*, 53 F.3d at 484. Congress responded to the crisis by enacting the Coal Act, Pub. L. No. 102-486, 106 Stat. 2776, 3036-56 (codified at 26 U.S.C. §§ 9701-9722). The Coal Act spread the costs of funding the pensions between the mining companies then in existence and the companies which had already left the industry (by imposing the latter group's obligations on "related persons," typically successors in interest). To enforce compliance, the Coal Act authorized the Secretary of the Treasury to impose taxes on companies who failed to meet their obligations under the Act.

LTV Steel Company, the plaintiff in *Chateaugay* and a former coal mining outfit which had already filed for bankruptcy protection at the time of the Act's passage, challenged the constitutionality of the Coal Act on two grounds: (1) it claimed that the Act violated the Due Process Clause; and (2) that the Act constituted a taking of private property for public use without just compensation. The *Chateaugay* court affirmed the district court's dismissal of the due process claims after finding that the Coal Act, as an economic regulation, need only meet the rational basis level of scrutiny. 53 F.3d at 486-491.

Of greater interest for our purposes is the court's analysis of the takings claims. Citing the declaratory nature of the relief sought by LTV Steel, the court began its examination of the takings claims by expressly rejecting the government's theory that the district court was without jurisdiction to hear

them. *Id.* at 491-92 ("We find no merit to the government's suggestion that the Tucker Act, 28 U.S.C. § 1491(a), acts to remove from the federal district courts jurisdiction over an action for declaratory relief where no money damages have been requested.").

The court then proceeded to address the thornier issue of whether a takings claim could ever be brought in a district court without first seeking compensation in the CFC. *Id.* at 492. After surveying a wide variety of Supreme Court decisions, the *Chateaugay* court noted a distinction between the Supreme Court's endorsement of district court jurisdiction over (1) statutes burdening real and tangible property; and (2) those requiring direct transfers of money to the government. *Id.* at 493. Finding significance in that distinction, the *Chateaugay* court concluded as follows:

> We hold that where the challenged statute requires a person or entity to pay money to the government, it must be presumed that Congress had no intention of providing compensation for the deprivation through the Tucker Act. Common sense dictates such a presumption. For example, in the case of the Black Lung Act, which required mining companies to contribute funds for the benefit of afflicted former miners, it would make no sense to presume that Congress intended for the Treasury to compensate mining companies for their contributions because the Act lacks an express Congressional statement to the contrary. Such a presumption would tend to nullify all existing legislation adjusting the benefits and

> burdens of economic life: Every dollar paid pursuant to a statute would be presumed to generate a dollar of Tucker Act compensation.

53 F.3d at 493.

While defendants attempt to distinguish *Chateaugay* on the grounds that the Coal Act required the mine owners to pay compensation to a privately operated fund, as opposed to the government itself, it is clear from the decision that the court based its reasoning on the assumption that the mine owners were being forced to pay money directly to the government. *See* 53 F.3d at 493 n.6. In addition, we agree with the position advanced by plaintiffs at oral argument that as far as their due process claims are concerned, whether the payments are remitted to a private fund or to the government is of no import because the harm is suffered as a result of the deprivation of their property and without regard to who ultimately receives the property.

As a result, the *Chateaugay* holding, which was expressly adopted by the Supreme Court in *Eastern Enterprises v. Apfel* (1998) 118 S.Ct. 2131, at 2145, is directly on point. In the statute at bar, 42 U.S.C. § 2297g-1(g), Congress provided that "[a]ny special assessment levied under this section on domestic utilities . . . shall be deemed a necessary and reasonable current cost of fuel and shall be fully recoverable in rates in all jurisdictions in the same manner as the utility's other fuel cost." As did the *Chateaugay* court on the facts before it, we believe, after consideration of those before us, that it would defy logic for the EPACT Congress to have intended for the Treasury to

compensate nuclear power companies dollar-for-dollar for their assessment costs. This fact is further evidenced by the statute itself, which authorized the power companies to recover their additional costs via utility rate increases — i.e., Congress plainly intended for the plaintiffs to be compensated by the energy-consuming public as opposed to government coffers.

As a result, we conclude that the decisions in *Chateaugay* and *Eastern Enterprises* establish that constitutional challenges to federal statutes which mandate payment of money directly to the government may be heard in federal district court.

B. Waiver of sovereign immunity

Assuming, *arguendo*, that the foregoing discussion is faulty, we conclude that any sovereign immunity the government may have enjoyed is waived by Section 702 of the Administrative Procedures Act ("APA"), 5 U.S.C. § 702. That section waives sovereign immunity for claims against the government seeking "other than money damages":

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor

> relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States . . . Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

In support of their contention that such section does not waive sovereign immunity in this forum, defendants raise three arguments: (1) immunity is not waived because the Tucker Act "impliedly forbids" the relief sought by plaintiffs; (2) immunity is not waived because the nature of the relief sought is not "other than money damages"; and (3) immunity is not waived because § 702, read in conjunction with § 704, operates to preclude review since plaintiffs have an adequate remedy in the CFC. We will take each argument in turn.

(1) A survey of relevant case law makes it apparent that as a general rule the Tucker Act has been held to "impliedly forbid" claims that seek (in essence) money damages, but not those that seek (in essence) equitable relief. *Compare Polanco v. United States Drug Enforcement Administration* (2d Cir. 1998) 158 F.3d 647, 652 (APA waives sovereign immunity for relief that is equitable in nature, notwithstanding the fact that the property at issue is currency); and *United States v. Vazquez* (2d Cir.

1998) 145 F.3d 74, 79 (United States has expressly consented to suit in cases seeking declaratory and injunctive relief); *with Brazos Electric Power Cooperative, Inc.* (Fed. Cir. 1998) 144 F.3d 784, 788 (sovereign immunity not deemed waived where "a single, uncomplicated payment of money [by the government] would provide Brazos with an entirely adequate remedy. No prospective relief would be required . . ."); and *Kanemoto v. Reno* (Fed. Cir. 1994) 41 F.3d 641 (because "naked money judgment" would provide Kanemoto with an adequate remedy, APA does not waive sovereign immunity in district court).

Moreover, where significant prospective relief is implicated, as it is on the facts at bar[1], the preferred forum is in federal district court. *See National Center for Manufacturing Sciences v. United States* (Fed. Cir. 1997) 114 F.3d 196, 201 (where declaratory or injunctive relief which might "require the government to modify future practices" is sought, CFC is not empowered to grant full relief and district court jurisdiction must be upheld). Finally, the mere incantation by defendants of the fact that plaintiffs seek to enforce contractual rights does not, in our view, wrest us of jurisdiction. *See Transohio Savings Bank, et al. v. Director, Office of Thrift Supervision, et al.* (D.C. Cir. 1992) 967 F.2d 598, 609 ("The answer to the sovereign immunity and jurisdiction questions depends not simply on whether a case involves

---

1. We observed in our Opinion and Order of November 1998 that of a total of $2.25 billion in assessments to be paid over the entire fifteen year period, only six assessments totaling $560 million had been paid by plaintiffs.

contract issues, but whether, despite the presence of a contract, plaintiffs' claims are founded only on a contract, or whether they stem from a statute or the Constitution."). The *Transohio* court proceeded to hold that under § 702 and the Tucker Act, litigants may bring common-law contract claims only as actions for money damages in the CFC, but statutory and constitutional claims (even those depending on the existence and terms of a contract with the government) may be brought in federal district court. 967 F.2d at 610. Inasmuch as the plaintiffs at bar seek significant prospective relief, which is exclusively declaratory and injunctive in nature, and depends largely on the Constitution while only peripherally on contracts with the United States, we hold that the Tucker Act does not "impliedly forbid" the relief sought.

(2) It is beyond dispute that the complaint before us, by its terms, seeks only declaratory and injunctive relief. Of the seven counts, the operative claim seeks injunctive relief to preclude the government from enforcing the special assessment statutes while the other six seek declaratory judgments relating to unconstitutional takings, due process violations, and breaches of contract.

Defendants contend that though it was carefully crafted to avoid seeking money damages by name, the complaint as a practical matter seeks compensatory (i.e., money) damages for losses suffered from an alleged breach of contract. As a result, they argue, it does not seek "other than money damages" within that phrase's meaning in the APA, and thus sovereign immunity has not been waived.

This argument can be resolved in much the same manner as the first. The issue before us is whether the relief plaintiffs' seek is akin to an action for damages, "which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation," or is related to an equitable action for specific relief, "which may include . . . the recovery of specific property or monies, ejectment from land, or injunction either directing or restraining the defendant officer's actions." *Bowen v. Massachusetts* (1988) 487 U.S. 879, 892 (quoting *Larson v. Domestic & Foreign Commerce Corp.* (1949) 337 U.S. 682, 688). We conclude that the complaint at bar seeks the latter and not the former.

The Supreme Court noted in *Bowen* that the CFC does not have the general equitable powers of a district court to grant prospective relief. 487 U.S. at 905. "We are not willing to assume, categorically, that a naked money judgment against the United States will always be an adequate substitute for prospective relief fashioned in the light of the rather complex ongoing relationship between the parties." *Id.* Because the relief sought here is disproportionately prospective and therefore equitable (as opposed to compensatory), we believe that the government, through the APA, has waived whatever sovereign immunity it may have had, and that district court jurisdiction is proper.

(3) Section 704 of the APA provides, in relevant part, that "[a]gency action made reviewable by statute and final agency action for which there is no other

adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. We can cite no more persuasive support for our conclusion that the CFC does not provide plaintiffs with an "adequate remedy" than the actions of that court itself. In *New York Power Authority v. United States* (Fed. Cl. Jan. 29, 1999) __ Fed. Cl. __, 1999 WL 38966 (No. 97-236C), Judge Gibson of the CFC stayed that related action in deference to the case at bar, citing the CFC's incapacity to render judgment over plaintiffs' due process claims as well as its inability to grant equitable relief.

CONCLUSION

For the foregoing reasons, defendants' motion to transfer this action to the court of claims, or in the alternative to dismiss for lack of subject matter jurisdiction is denied. However, inasmuch as we believe, in accordance with 28 U.S.C. § 1292(b) that this decision "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation," we again certify this question for interlocutory appeal.

SO ORDERED.
April 12, 1999
New York, New York

s/ Whitman Knapp
WHITMAN KNAPP, SENIOR
U.S.D.J.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT GRANTING MOTION TO STAY ISSUANCE OF MANDATE DATED AND FILED JUNE 7, 2001

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

99-1464

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., NEW YORK POWER AUTHORITY, NIAGARA MOHAWK POWER CORPORATION, ROCHESTER GAS AND ELECTRIC CORPORATION, ARIZONA PUBLIC SERVICE CORPORATION, COMMONWEALTH EDISON COMPANY, DUKE ENERGY CORPORATION, ENTERGY GULF STATES, INC., FLORIDA POWER CORPORATION, FLORIDA POWER AND LIGHT COMPANY, GPU NUCLEAR, INC. (on behalf of Jersey Central Power & Light Company, Metropolitan Edison Company, and Pennsylvania Electric Company), INDIANA MICHIGAN POWER COMPANY, NEBRASKA PUBLIC POWER DISTRICT, PECO ENERGY COMPANY, SOUTHERN CALIFORNIA EDISON COMPANY, SOUTHERN NUCLEAR OPERATING COMPANY, INC., SYSTEM FUELS, INC., TEXAS UTILITIES ELECTRIC COMPANY, VIRGINIA ELECTRIC & POWER COMPANY, WASHINGTON PUBLIC POWER SUPPLY SYSTEM, WISCONSIN PUBLIC SERVICE CORPORATION, and WOLF CREEK NUCLEAR OPERATING CORPORATION (on behalf of Kansas City Power & Light Company, Kansas Electric Power Cooperative, Inc., and Kansas Gas and Electric Company),

Plaintiffs-Appellees,

v.

Appendix D

UNITED STATES, DEPARTMENT OF ENERGY, DEPARTMENT OF ENERGY AS SUCCESSOR TO THE UNITED STATES ATOMIC ENERGY COMMISSION, and ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION,

Defendants-Appellants.

ON MOTION

Before RADER, *Circuit Judge*, PLAGER, *Senior Circuit Judge*, and GAJARSA, *Circuit Judge*.

Dissenting opinion filed by *Circuit Judge* GAJARSA.

ORDER

The Appellees move to stay issuance of the mandate for 90-days to enable them to file a petition for writ of certiorari at the Supreme Court of the United States. The Appellants file an opposition, and the Appellees file a reply to the opposition.

Upon consideration thereof,

IT IS ORDERED THAT:

(1) The motion is granted.

FOR THE COURT,

JUN -7 2001
Date

s/ Jan Horbaly
Jan Horbaly
Clerk

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

99-1464

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., NEW YORK POWER AUTHORITY, NIAGARA MOHAWK POWER CORPORATION, ROCHESTER GAS AND ELECTRIC CORPORATION, ARIZONA PUBLIC SERVICE CORPORATION, COMMONWEALTH EDISON COMPANY, DUKE ENERGY CORPORATION, ENTERGY GULF STATES, INC., FLORIDA POWER CORPORATION, FLORIDA POWER AND LIGHT COMPANY, GPU NUCLEAR, INC. (on behalf of Jersey Central Power & Light Company, Metropolitan Edison Company, and Pennsylvania Electric Company), INDIANA MICHIGAN POWER COMPANY, NEBRASKA PUBLIC POWER DISTRICT, PECO ENERGY COMPANY, SOUTHERN CALIFORNIA EDISON COMPANY, SOUTHERN NUCLEAR OPERATING COMPANY, INC., SYSTEM FUELS, INC., TEXAS UTILITIES ELECTRIC COMPANY, VIRGINIA ELECTRIC & POWER COMPANY, WASHINGTON PUBLIC POWER SUPPLY SYSTEM, WISCONSIN PUBLIC SERVICE CORPORATION, and WOLF CREEK NUCLEAR OPERATING CORPORATION (on behalf of Kansas City Power & Light Company, Kansas Electric Power Cooperative, Inc., and Kansas Gas and Electric Company),

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v.

Appendix D

UNITED STATES, DEPARTMENT OF ENERGY, DEPARTMENT OF ENERGY AS SUCCESSOR TO THE UNITED STATES ATOMIC ENERGY COMMISSION, and ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION,

Defendants-Appellants.

GAJARSA, *Circuit Judge*, dissenting.

I respectfully dissent from the grant of the motion to stay the mandate. I would deny the motion because plaintiffs-appellees ("ConEd") have failed to show that a certiorari petition would present a "substantial question" and have not demonstrated "good cause" warranting a stay of our mandate. ConEd's arguments relying on *Bowen v. Massachusetts*, 487 U.S. 879 (1988) and *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) are misplaced. ConEd cannot establish that this court misinterpreted either *Bowen* or *Eastern Enterprises* to present a "substantial question" for certiorari within the meaning of Rule 41(d)(2) of the Federal Rules of Appellate Procedure. The reasoning of the Supreme Court in *Bowen* was based on the unusual facts of that case and we should not infer any broad rules from it. For the following reasons, a "substantial question" cannot obtain.

First, *Bowen* was based on the complexity of the relationship between the federal government and a state government under the Medicare program. The Supreme Court was "not willing to assume, categorically, that a naked money judgment against the United States was an adequate substitute for prospective relief" in view of the complex ongoing relations. The relationship between ConEd and the

United States, which involves a known and fixed series of payments over fifteen years is not particularly complex. Second, the *Bowen* Court recognized the involvement of a state, and was reluctant to force a state to litigate before the Court of Federal Claims. Third, the *Bowen* Court raised questions about the Court of Federal Claims' jurisdiction to award appropriate relief under the facts of *Bowen*. It noted, "in some cases the jurisdiction of the [Court of Federal Claims] to entertain the action, or perhaps even enter a specific money judgment against the United States, would be at least doubtful." *Bowen*, 487 U.S. at 905-06. In the instant case, the Court of Federal Claims' jurisdiction is not at issue. Payments have been made and the cause of the action for the refund lies with the Court of Federal Claims. Fourth, in *Bowen*, certain state law questions were at issue and the Supreme Court noted that the Court of Federal Claims lacked expertise in such cases. It specifically pointed out that it would have been "nothing less than remarkable to conclude that Congress intended judicial review of these complex questions of federal-state interaction to be reviewed in a specialized forum such as the Court of [Federal] Claims". *Bowen*, at 487 U.S. at 908.

Based upon these reasons, *Bowen* can be easily distinguished, and ConEd fails to rebut any of the reasons clearly articulated in this Court's opinion of May 3, 2001. *Consolidated Edison v. United States*, 2001 WL 468126 (Fed. Cir. May 3, 2001).

ConEd's reliance on *Eastern Enterprises* is even more misplaced. First, there is no majority opinion in *Eastern Enterprises* that can be relied upon as precedent to support ConEd's position. 524 U.S. 498 (1998). Second, unlike

ConEd, the plaintiffs in *Eastern Enterprises* did not invoke the jurisdiction of the Court of Federal Claims by claiming that the assessments were "illegal exactions" and did not ask for monetary relief. Instead, the *Eastern Enterprises* plaintiffs brought suit in Federal District Court and sought declaratory judgment that the Coal Act was unconstitutional. 524 U.S. at 520. In fact, the *Eastern Enterprises* plurality specifically recognized that, "[i]n this case . . . Eastern does not seek compensation from the government." *Id.*

Even the original majority opinion in this case recognized the limitations of *Eastern Enterprises*, and did not rely on it because, "no monies were paid to the respective funds prior to the declaratory and injunctive relief actions being filed." *Consolidated Edison v. United States*, 234 F.3d 642, 650 n.3 (Fed. Cir. 2000), *vacated by* 2001 WL 468126 (Fed. Cir. May 3, 2001).

Finally, ConEd has failed to demonstrate any "good cause" warranting stay of our mandate. ConEd contends that the mandate should be stayed in the interests of judicial economy. However, our decision specifically reprimands ConEd for "such blatant forum shopping to avoid adequate remedies" in the Court of Federal Claims. *Consolidated Edison*, 2001 WL 468126. "Every legal issue that ConEd seeks to resolve . . . could be (and, in some cases, *has been*) decided in a suit before the Court of Federal Claims. *Id.* Thus, judicial economy is best served by consolidating these cases with those already before the Court of Federal Claims.

Because ConEd has neither raised a "substantial question" for certiorari, nor shown "good cause" warranting stay of our mandate, I respectfully dissent.

APPENDIX E — RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

AMENDMENT V

AMENDMENT V — GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * *

5 U.S.C. § 702

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the

ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

* * *

5 U.S.C. § 704

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

* * *

Appendix E

28 U.S.C. §§ 1292(d)(4)(A) and (B)

§ 1292. Interlocutory decisions

* * *

(d)(4)(A) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a motion to transfer an action to the United States Court of Federal Claims under section 1631 of this title.

(B) When a motion to transfer an action to the Court of Federal Claims is filed in a district court, no further proceedings shall be taken in the district court until 60 days after the court has ruled upon the motion. If an appeal is taken from the district court's grant or denial of the motion, proceedings shall be further stayed until the appeal has been decided by the Court of Appeals for the Federal Circuit. The stay of proceedings in the district court shall not bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonably necessary. However, during the period in which proceedings are stayed as provided in this subparagraph, no transfer to the Court of Federal Claims pursuant to the motion shall be carried out.

* * *

Appendix E

28 U.S.C. § 1331

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

* * *

28 U.S.C. § 1491(a)(1)

§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

* * *

Appendix E

28 U.S.C. § 1631

§ 1631. Transfer to cure want of jurisdiction

Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

* * *

42 U.S.C. § 2297g

§ 2297g. Uranium Enrichment Decontamination and Decommissioning Fund

(a) Establishment

There is established in the Treasury of the United States an account to be known as the Uranium Enrichment Decontamination and Decommissioning Fund (referred to in this subchapter as the "Fund"). The Fund, and any amounts deposited in it, including any interest earned thereon, shall be available to the Secretary subject to appropriations for the exclusive purpose of carrying out this subchapter.

Appendix E

(b) Administration

(1) In general

The Secretary of the Treasury shall hold the Fund and, after consultation with the Secretary, annually report to the Congress on the financial condition and operations of the Fund during the preceding fiscal year.

(2) Investments

The Secretary of the Treasury shall invest amounts contained within the Fund in obligations of the United States —

> **(A)** having maturities determined by the Secretary of the Treasury to be appropriate for what the Department determines to be the needs of the Fund; and
>
> **(B)** bearing interest at rates determined to be appropriate by the Secretary of the Treasury, taking into consideration the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to these obligations.

* * *

Appendix E

42 U.S.C. § 2297g-1

§ 2297g-1. Deposits

(a) Amount

The Fund shall consist of deposits in the amount of $480,000,000 per fiscal year (to be annually adjusted for inflation using the Consumer Price Index for all-urban consumers published by the Department of Labor) as provided in this section.

(b) Source

Deposits described in subsection (a) of this section shall be from the following sources:

(1) Sums collected pursuant to subsection (c) of this section.

(2) Appropriations made pursuant to subsection (d) of this section.

(c) Special assessment

The Secretary shall collect a special assessment from domestic utilities. The total amount collected for a fiscal year shall not exceed $150,000,000 (to be annually adjusted for inflation using the Consumer Price Index for all-urban consumers published by the Department of Labor). The amount collected from each utility pursuant to this subsection for a fiscal year shall be in the same ratio to the amount

required under subsection (a) of this section to be deposited for such fiscal year as the total amount of separative work units such utility has purchased from the Department of Energy for the purpose of commercial electricity generation, before October 24, 1992, bears to the total amount of separative work units purchased from the Department of Energy for all purposes (including units purchased or produced for defense purposes) before October 24, 1992. For purposes of this subsection —

> **(1)** a utility shall be considered to have purchased a separative work unit from the Department if such separative work unit was produced by the Department, but purchased by the utility from another source; and
>
> **(2)** a utility shall not be considered to have purchased a separative work unit from the Department if such separative work unit was purchased by the utility, but sold to another source.

(d) Authorization of appropriations

There are authorized to be appropriated to the Fund, for the period encompassing 15 years after October 24, 1992, such sums as are necessary to ensure that the amount required under subsection (a) of this section is deposited for each fiscal year.

Appendix E

(e) Termination of assessments

The collection of amounts under subsection (c) of this section shall cease after the earlier of —

(1) 15 years after October 24, 1992; or

(2) the collection of $2,250,000,000 (to be annually adjusted for inflation using the Consumer Price Index for all-urban consumers published by the Department of Labor) under such subsection.

(f) Continuation of deposits

Except as provided in subsection (e) of this section, deposits shall continue to be made into the Fund under subsection (d) of this section for the period specified in such subsection.

(g) Treatment of assessment

Any special assessment levied under this section on domestic utilities for the decontamination and decommissioning of the Department's gaseous diffusion enrichment facilities shall be deemed a necessary and reasonable current cost of fuel and shall be fully recoverable in rates in all jurisdictions in the same manner as the utility's other fuel cost.

* * *

Appendix E

C.F.R. §§ 766.103 and 766.106

PART 766 — URANIUM ENRICHMENT DECONTAMINATION AND DECOMMISSIONING FUND; PROCEDURES FOR SPECIAL ASSESSMENT OF DOMESTIC UTILITIES

* * *

§ 766.103 Special Assessment invoices.

(a) DOE shall issue annually a Special Assessment invoice to each domestic utility. This invoice will specify itemized quantities of enrichment services by reactor. In each Special Assessment invoice, DOE shall require payment, on or before 30 days from the date of each invoice, of that utility's prorated share of the Baseline Total Annual Special Assessment, as adjusted for inflation using the most recently published monthly CPI-U data.

(b) DOE shall enclose with the Fiscal Year 1993 Special Assessment invoice a sealed, business confidential, summary SWU transaction statement including:

(1) TESS information which documents, by reactor, the basis of the utility's assessment;

(2) A list of domestic utilities subject to the Special Assessment;

(3) The total number of SWUs purchased from DOE by all domestic utilities for all purposes prior to October 24, 1992;

(4) The total number of SWUs purchased from DOE for all purposes prior to October 24, 1992, including SWUs purchased or produced for defense purposes; and

(5) Such other information as may be appropriate.

(c) With regard to any fiscal year after Fiscal Year 1993, DOE shall enclose a summary SWU transaction statement with Special Assessment invoices that will include updated information regarding adjustments to Special Assessments resulting from the reconciliation and appeals process under Section 766.104.

(d) The date of each Annual Special Assessment invoicing will be set on or about October 1 with payment due 30 calendar days from the date of invoice starting with the Fiscal Year 1995 Special Assessment.

* * *

§ 766.106 Late payment fees.

In the case of a late payment by a domestic utility of its Special Assessment, the domestic utility shall pay interest at the per annum rate (365-day basis) established by DOE for general application to monies due DOE and not received by DOE on or before a designated due date. Interest shall accrue beginning the date of the designated payment except that, whenever the due date falls on a Saturday, Sunday, or a United States legal holiday, interest shall commence on the

next day immediately following which is not a Saturday, Sunday, or United States legal holiday. Late payment provisions for the Special Assessment to the Fund shall be based on the Treasury Current Value of Funds Rate (which is published annually by the Treasury and used in assessing interest charges for outstanding debts on claims owed to the United States Government), plus six (6) percent pro rata on a daily basis. The additional six (6) percent charge shall not go into effect until five (5) business days after payment was originally due. Late payment fees shall be invoiced within two days of receipt of utility payment of the special assessment when delinquency is less than 30 days. For longer periods of delinquency, DOE will submit additional invoices, as appropriate. Late payment fees will be due 30 days from the date of invoice.

* * * *

Supreme Court, U.S.
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No. 01-205

In the Supreme Court of the United States

CONSOLIDATED EDISON COMPANY OF NEW YORK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners, public utility companies seeking declaratory and injunctive relief in district court on their contractual and constitutional challenge to the annual Special Assessments levied pursuant to the Energy Policy Act of 1992 (EPACT), 42 U.S.C. 2297g *et seq.*, had an adequate remedy before the Court of Federal Claims for purposes of 5 U.S.C. 704, where petitioners had pending in the Court of Federal Claims actions challenging EPACT on the same substantive grounds and seeking refunds of EPACT Special Assessments already paid by those utilities in earlier years.

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In the Supreme Court of the United States

No. 01-205

CONSOLIDATED EDISON COMPANY OF NEW YORK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The initial December 5, 2000, opinion of the court of appeals (Pet. App. 19a-47a) is reported at 234 F.3d 642. The May 3, 2001, en banc order of the court of appeals granting the petition for rehearing en banc and returning the matter to the merits panel for issuance of a revised opinion (Pet. App. 17a-18a) is reported at 247 F.3d 1386. The May 3, 2001, revised opinion of the panel (Pet. App. 1a-16a) is reported at 247 F.3d 1378. The opinion and order of the district court (Pet. App. 48a-59a) is reported at 45 F. Supp. 2d 331.

JURISDICTION

The judgment of the court of appeals was entered May 3, 2001. The petition for a writ of certiorari was filed August 1, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Administrative Procedure Act (APA) provides a cause of action to challenge agency action in federal district court where "there is no other adequate remedy in a court" under another statute. 5 U.S.C. 704. By its express terms, Section 704 "does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures." *Bowen* v. *Massachusetts*, 487 U.S. 879, 903 (1988). This case concerns whether Section 704 permits petitioners, who can obtain and in fact have already sought judicial review of their claims in the Court of Federal Claims, to bring the same claims in an action for prospective relief in district court under the APA.

1. In 1992, Congress enacted the Energy Policy Act of 1992 (EPACT), Pub. L. No. 102-486, 106 Stat. 2776. Under EPACT, the government spun off its uranium enrichment services to a newly created corporation, the United States Enrichment Corporation (USEC). See Pub. Law No. 102-486, § 901, 106 Stat. 2923 (42 U.S.C. 2297). All of the enrichment contracts between the government and the utilities were assigned to the USEC. 42 U.S.C. 2297c(b)(1). The transfer became effective July 1, 1993. 42 U.S.C. 2297b-14(e).

EPACT established the Uranium Decontamination and Decommissioning Fund (the Fund), which is to be used to meet the costs of cleaning up government enrichment facilities. See 42 U.S.C. 2297g-2(b) (establishing the Fund to pay "[t]he costs of all decontamination

and decommissioning activities of the Department [of Energy] * * * until such time as the Secretary certifies and the Congress concurs, by law, that such activities are complete"). The Act provides for the federal government to absorb the lion's share of the clean-up costs. In particular, Congress must contribute $330 million annually, or 68% of the total cost, through annual appropriations over a 15-year period, with the amount adjusted annually to account for inflation. See 42 U.S.C. 2297g-1.

EPACT further provides that the remaining 32% (a figure not to exceed $2.25 billion over 15 years) would be collected in annual installments (not to exceed $150 million per year) over the 15-year period, to be adjusted annually for inflation, from those domestic utility companies that had used government-enriched uranium in the generation of electricity. See 42 U.S.C. 2297g-1. The amount of the fee assessed each domestic utility company is based on the percentage of enrichment work units each had purchased from the Department of Energy, relative to the total number of work units produced by the Department of Energy over the life of the enrichment facilities. The formula thus apportions contributions to the Fund based on each utility's pro-rata consumption of uranium enriched by the federal government. The Department of Energy calculated the amount to be collected from each utility shortly after EPACT was enacted and is collecting those sums annually over the 15-year period. See 10 C.F.R. Pt. 766; 58 Fed. Reg. 41,164 (1993); 59 Fed. Reg. 41,956 (1994). Once a year, each utility is invoiced for its predetermined share of the assessments. See 10 C.F.R. 766.103.

2. Soon after the enactment of EPACT, petitioners and other utility companies filed several separate suits in the Court of Federal Claims challenging the EPACT

assessments on constitutional and contractual grounds. The plaintiffs in those suits asserted that the Court of Federal Claims had jurisdiction to order the refund of monies that were "illegally exacted" from them under EPACT and paid into the Special Assessment Fund. In one of those suits, the Federal Circuit reached the merits of the claims and sustained EPACT against takings and breach of contract theories of liability. See *Yankee Atomic Elec. Co.* v. *United States*, 112 F.3d 1569 (Fed. Cir. 1997), cert. denied, 524 U.S. 951 (1998).

After the decision in *Yankee Atomic*, petitioners filed this action in federal district court in New York, relying on the same constitutional and contractual claims they had asserted in support of their "illegal exaction" suits in the Court of Federal Claims. The United States moved to transfer the district court case to the Court of Federal Claims under 28 U.S.C. 1631. Petitioners, the government argued, could not bring suit under the APA because they had an "adequate remedy" in another court within the meaning of Section 704, *viz.* their still-pending refund action in the Court of Federal Claims. The district court denied that motion. Pet. App. 48a-59a. The United States filed an appeal of that denial to the Federal Circuit, as permitted by 28 U.S.C. 1292(d)(4)(A). Pursuant to 28 U.S.C. 1292(d)(4)(B), district court proceedings were stayed pending the decision of the Federal Circuit.

3. In an initial decision issued December 5, 2000, a divided panel of the Federal Circuit affirmed. The majority acknowledged that petitioners had initially brought suit in the Court of Federal Claims seeking a refund of the assessments they already had paid into the Fund. The panel held, however, that petitioners nonetheless could also file a separate suit in district court, so long as they sought only declaratory or other

equitable relief as to prospective payments. The panel majority acknowledged that, in so holding, it was permitting petitioners to "forum shop[]" and thus evade the Circuit's earlier decision in *Yankee Atomic*. Pet. App. 24a ("This district court case does warrant the Government's 'forum shopping' characterization."). The majority nonetheless held that the Court of Federal Claims did not provide an "adequate remedy" to prevent the constitutional wrongs alleged by petitioners under *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988), because this case "features a complex ongoing relationship to decontaminate and decommission nuclear facilities." Pet. App. 30a. The majority concluded that "[i]n this complex ongoing relationship, this court, like the Supreme Court in *Bowen*, cannot be sure that a money judgment will adequately substitute for prospective relief," which, the court opined, "lies beyond the powers of the Court of Federal Claims." *Ibid.*

Judge Gajarsa dissented. Pet. App. 33a-47a. The Court of Federal Claims, Judge Gajarsa reasoned, has jurisdiction over all of petitioners' constitutional and contractual claims in the pending refund suits in the Court of Federal Claims. Because petitioners had a fully adequate remedy in the Court of Federal Claims, he explained, suit under the APA was not authorized by 5 U.S.C. 704. Disagreeing with the majority's assertion that the case involves a "complex ongoing relationship" of the type found in *Bowen*, Judge Gajarsa explained that "[a] decision by the CFC [in plaintiffs' pending suits] would effectively moot any prospective relief that the district court could afford." Pet. App. 41a-42a. If the Court of Federal Claims were to hold the assessments unlawful, he noted, that decision would have the effect of declaratory relief: The decision

"would be binding and it is absurd to believe that the [Department of Energy] would continue to require the domestic utilities to make payment of unlawful exactions." *Id.* at 42a.

4. The Federal Circuit granted rehearing en banc, vacated the December 5, 2001, panel decision, and returned the case to the merits panel; the panel in turn issued a unanimous "revised opinion" to "accompan[y]" the en banc court's order. Pet. App. 18a. The new panel decision reversed the district court's refusal to transfer the case to the Court of Federal Claims, holding that the Court of Federal Claims could provide a fully adequate remedy to adjudicate all of petitioners' claims. As a result, the panel concluded, the district court lacked jurisdiction under Section 704 of the APA to adjudicate petitioners' claims. *Id.* at 8a-9a.

The court of appeals distinguished this Court's decision in *Bowen*. Noting that the Court in *Bowen* had expressed doubts as to whether the Court of Federal Claims had jurisdiction to entertain the actions, the court of appeals explained that "this case presents no jurisdictional problems" because "[t]he Court of Federal Claims has long possessed jurisdiction to consider constitutional claims, such as [petitioners'] claims about the EPACT assessments, under the 'illegal exaction' doctrine." Pet. App. 10a. Indeed, the court noted that "the factual background and the constitutional claims at issue in the current litigation overlap with those already before the Court of Federal Claims" in several other lawsuits. *Id.* at 11a.

The court of appeals also distinguished *Bowen* on the ground that it involved a complex, ongoing relationship between the federal government and the States under the Medicaid program. The EPACT program, the court observed, is unlike the Medicaid program, because "the

relationship between Con Ed and the United States features a known and fixed series of payments over time," whereas the Medicaid statutory program featured "shifting populations and demographics, advancing medical technologies, unforeseeable health threats, and varying state and federal economic conditions." *Ibid.*

The court of appeals further noted that the Medicaid controversy at issue in *Bowen* "typically involve[s] state governmental activities that a district court would be in a better position to understand and evaluate than a single tribunal headquartered in Washington." Pet. App. 11a (quoting *Bowen*, 487 U.S. at 907-908). In contrast, "this case does not involve a state at all" but "relates to a contract between the utilities and the Government, and specifically, the utilities' financial obligations under EPACT." *Ibid.* In sum, the court concluded, this case does not "involve '[m]anaging the relationships between States and the Federal Government that occur over time and that involve constantly shifting balance sheets,'" and thus does not involve "state governmental activities that a district court would be in a better position to understand and evaluate." *Ibid.* (quoting *Bowen*, 487 U.S. at 904 n.39, 907-908).

The court of appeals also concluded that "the procedural background and facts of this case indicate that the Court of Federal Claims can supply an adequate remedy even without an explicit grant of prospective relief." Pet. App. 12a. Noting that petitioners had already alleged the same constitutional and contractual theories of recovery in seeking refunds in illegal exaction suits in the Court of Federal Claims, the court reasoned that success on those claims for retrospective relief would effectively provide petitioners with pro-

spective relief. If petitioners prevailed in those suits, the court reasoned, "the United States could not proceed to assess further EPACT payments without again illegally exacting funds." *Ibid.* Noting that res judicata principles "would require immediate refund" of any such assessment, the court stated that "this court cannot imagine that the United States would continue to require the utility companies to pay unlawful exactions." *Ibid.* As a result, "[r]elief from [petitioners'] retrospective obligations will also relieve [them] from the same obligations prospectively." *Ibid.*

Finally, the court of appeals noted that the "procedural background of this case seals the conclusion that [petitioners have] an adequate remedy in the Court of Federal Claims." Pet. App. 13a. Noting that petitioners' district court suit had been filed only after the adverse decision in *Yankee Atomic*, the court reasoned that petitioners had simply "artfully recast [their] complaint to circumvent the jurisdiction of the Court of Federal Claims," engaging in "blatant forum shopping to avoid adequate remedies in an alterative forum." *Id.* at 13a, 14a. The court explained that "[e]very legal issue that [petitioners] seek[] to resolve in this district court case could be (and, in some cases, has been) decided in a suit before the Court of Federal Claims." *Id.* at 14a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any decision of any other court of appeals. Further review therefore is not warranted.

1. Petitioners' principal argument is that the court of appeals' decision is inconsistent with *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988). Pet. 11. *Bowen*,

petitioners appear to argue, stands for the broad proposition that complaints seeking prospective or injunctive relief automatically "fall within the exclusive domain of the district courts." Pet. 14. That reading of *Bowen* is overbroad, incorrect, and textually irreconcilable with 5 U.S.C. 704.

The Administrative Procedure Act (APA) does, as a general matter, provide a cause of action to challenge agency action in district court, subject to certain limits. Jurisdiction for such suits is conferred by 28 U.S.C. 1331; and the APA, 5 U.S.C. 702, expressly waives sovereign immunity from such suits to the extent they do not seek money damages.[1] See, *e.g.*, *Califano* v. *Sanders*, 430 U.S. 99 (1977). Section 704, however, limits the availability of such actions by permitting them only when "there is no other adequate remedy in a court" under another statute. 5 U.S.C. 704. As this Court has explained, Section 704 "does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures." *Bowen*, 487 U.S. at 903. Thus, if adequate review may be obtained in another forum, such as the Court of Federal Claims under the Tucker Act, Section 704 precludes litigants such as petitioners from seeking review under the APA.

Here, the Federal Circuit concluded that a lawsuit in the Court of Federal Claims, brought under the Tucker Act for a refund of money illegally exacted, would provide petitioners with "adequate" review. Nothing in *Bowen* contradicts that conclusion. To the contrary, in *Bowen*, the Court specifically observed that a Tucker Act suit in the Court of Federal Claims can "offer pre-

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[1] Petitioners do not dispute that their district court suit was brought against the United States under the APA.

cisely the sort of 'special and adequate review procedures' that § 704 requires to direct litigation away from the district courts." *Bowen*, 487 U.S. at 900-901 n.31; see also *id.* at 904 n.39. Under the specific circumstances presented in *Bowen*, of course, the Court expressed concern that the Court of Federal Claims might not have had jurisdiction over the claims at issue there. Here, in contrast, the Federal Circuit was confident that the Court of Federal Claims had jurisdiction.

Nor can petitioners persuasively argue that, for some fact-specific reason peculiar to this case, an action in the Court of Federal Claims under the Tucker Act would be inadequate. While petitioners filed this suit seeking prospective relief in district court, they have also filed precisely the same substantive claims in the Court of Federal Claims, demanding retrospective relief. As the Federal Circuit explained, if petitioners were to prevail in the Court of Federal Claims suit, "the United States could not proceed to assess further EPACT payments without again illegally exacting funds." Pet. App. 12a. Because res judicata principles "would require immediate refund" of any such assessment, "[r]elief from [petitioners'] retrospective obligations [would] also relieve [them] from the same obligations prospectively." *Ibid.* Indeed, "a decision by the Court of Federal Claims [in these cases] would effectively moot any prospective relief that the district court could afford." *Id.* at 14a.

The various court of appeals cases that petitioners cite are not to the contrary. Whether or not an alternative remedy is "adequate" necessarily must be examined on a case-by-case basis, and none of the decisions cited by petitioners remotely resembles the current case. Not one of them involved litigants that had already brought suit for retrospective relief in the Court of Federal Claims and then—following the issuance of

unfavorable Federal Circuit precedent—filed almost identical claims in APA actions for prospective relief in district court. Nor did any of them hold, as petitioners suggest, that an otherwise available Tucker Act remedy must automatically be considered "inadequate" for purposes of Section 704 merely because the plaintiff, in the APA action, requests prospective relief.[2]

For similar reasons, the decision below does not, as petitioners assert, limit *Bowen* "to its own facts." Pet. 16. The inquiry established by *Bowen* is always the

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[2] For example, while petitioners rely on *Polanco* v. *DEA*, 158 F.3d 647 (2d Cir. 1998), the court in *Polanco* found that the plaintiffs there could not bring any action at all—for retrospective or prospective relief—in the Court of Federal Claims under the Tucker Act. 158 F.3d at 652 & n.3. *Polanco*, moreover, is questionable authority following this Court's decision in *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255 (1999). Addressing the scope of the waiver of sovereign immunity in 5 U.S.C. 702, the Court in *Polanco* held that Section 702's bar against suits seeking "money damages" is inapplicable so long as the plaintiff seeks "equitable relief." 158 F.3d at 652. *Blue Fox*, however, makes it clear that "the equitable nature of the" relief sought "does not mean that [the] ultimate claim was not one for 'money damages.'" 525 U.S. at 262. Petitioners' reliance on *Randall* v. *United States*, 95 F.3d 339 (4th Cir. 1996), cert. denied, 519 U.S. 1150 (1997), is misplaced for similar reasons. There, as in *Polanco* and unlike here, the plaintiff could not bring a suit for "monetary damages on which to premise jurisdiction under the Tucker Act." *Id.* at 348. Finally, petitioners' reliance on *Veda, Inc.* v. *United States Department of the Air Force*, 111 F.3d 37 (6th Cir. 1997), and *Aetna Casualty & Surety Co.* v. *United States*, 71 F.3d 475 (2d Cir. 1995), is misplaced, because those decisions do not address Section 704, and nowhere address the adequacy of the Tucker Act remedy. Instead, they address only whether the actions were for "money damages" within the meaning of 5 U.S.C. 702. On that issue, moreover, they (like *Polanco*) are questionable authority following *Blue Fox*.

same, *i.e.*, whether the alternative remedy is "adequate" for purposes of Section 704 of the APA. Here, the court of appeals noted that the factors that had led to the finding of inadequacy in *Bowen* were completely absent. Unlike in *Bowen*, in this case there is no doubt as to whether the Court of Federal Claims will assert jurisdiction. Moreover, unlike in *Bowen*, there is no "complex, ongoing federal-state relationship"; there are no "constantly shifting balance sheets"; and there are no "state governmental activities." Nor do petitioners suggest any other factor that might render a Tucker Act remedy inadequate.

In essence, petitioners insist that one may always avoid the express mechanism for review provided by the Tucker Act by asking for prospective relief that the Court of Federal Claims cannot grant. As the court of appeals properly recognized, there simply is no basis for that bright-line rule, particularly where, as here, the claimants were pursuing substantially the same claims retrospectively under the Tucker Act at the time they filed their APA suit. Indeed, the rule in the Federal Circuit as well as in other circuits long has been that "[a] party may not avoid the [Court of Federal Claims'] jurisdiction by framing an action against the federal government that appears to seek only equitable relief when the party's real effort is to obtain damages in excess of $10,000." *Kanemoto* v. *Reno*, 41 F.3d 641, 646 (Fed. Cir. 1994). This rule makes clear what petitioners conveniently ignore: The courts are not bound by a plaintiff's allegations of the need for prospective relief. Rather, the courts assess jurisdictional questions by reference to the "true nature of the action." *Katz* v. *Cisneros*, 16 F.3d 1204, 1207 (Fed. Cir. 1994). See also Pet. App. 13 (citing authorities from other circuits).

In this case, the "true nature" of petitioners' district court suit was to avoid the jurisdiction of the Court of Federal Claims (and that of the Federal Circuit), where petitioners had initially filed suit but where other utilities have been unsuccessful on the merits. Seeking to escape the same fate, petitioners hope now to recover the EPACT assessments already paid by obtaining a declaration in district court, and then using that declaration as res judicata and collateral estoppel in their suits to recover past payments now pending in the Court of Federal Claims. Petitioners' purported need for prospective relief is thus a fiction.

Indeed, petitioners cannot claim that the unavailability of injunctive relief in the Court of Federal Claims renders suit in that forum inadequate, because petitioners are not entitled to equitable relief in *any* court, including in district court under the APA. The traditional rule is that equitable relief is unavailable where there is an adequate remedy at law. See, *e.g.*, *Sampson* v. *Murray*, 415 U.S. 61, 88 (1974) ("The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.") (quoting *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, 506-507 (1959)); *Mikohn Gaming Corp.* v. *Acres Gaming, Inc.*, 165 F.3d 891, 898 (Fed. Cir. 1998) (same).[3] As noted in *Sampson*, "[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation,

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[3] See also *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 111 (1983) ("The equitable remedy is unavailable absent a showing of irreparable injury."); *O'Shea* v. *Littleton*, 414 U.S. 488, 502 (1974) (noting that "[r]espondents have failed, moreover, to establish the basic requisites of the issuance of equitable relief in these circumstances—the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law").

weighs heavily against a claim of irreparable harm." 415 U.S. at 90 (quoting *Virginia Petroleum Jobbers Ass'n* v. *FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)). Here, petitioners have filed an action for such corrective, compensatory relief in the Court of Federal Claims. Because that suit can offer petitioners legal relief, they have no basis for seeking equitable relief under the APA. Indeed, the district court in this case (in the context of a discovery order) reached precisely that conclusion. Petitioners could not meet the equitable requirement of irreparable injury, the court found, because petitioners have a fully adequate remedy at law in the Court of Federal Claims in the form of a suit for a refund of any assessment illegally exacted. See *Consolidated Edison Co.* v. *United States*, 54 F. Supp. 2d 364 (S.D.N.Y. 1999), appeal dismissed for lack of jurisdiction, No. 99-6239, 2000 WL 713417 (2d Cir. May 11, 2000). For the same reason, they lack the irreparable injury necessary to obtain permanent injunctive relief.[4]

2. Petitioners also assert (Pet. 19-22) that the decision below conflicts with *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998). That contention is without merit. As an initial matter, *Eastern Enterprises* did not concern the meaning or effect of 5 U.S.C. 704. Instead, it concerned whether a "takings" claim under the Fifth Amendment is premature if a Tucker Act remedy is available. 524 U.S. at 521 (plurality opinion). As the Court explained in *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172, 193-

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[4] Petitioners' citation of cases regarding the availability of judicial review, Pet. 17-18, is beside the point. The question here is not whether review is available. It is where that review should be had.

195 (1985), a claim that the government has taken property without "just compensation" ordinarily is premature—because no violation has yet occurred—until available means of obtaining compensation have been employed and compensation has been denied. Here the question is not whether a takings claim is ripe. It is whether the APA and Section 704 afford petitioners an alternative avenue for relief in view of their already pending actions in the Court of Federal Claims.

More fundamentally, the plurality in *Eastern Enterprises* concluded that Congress did not intend to remit the plaintiffs in that case to a Tucker Act remedy. Distinguishing the Court's earlier decisions, which suggested that the availability of a Tucker Act remedy renders any takings claim in federal district court premature, the plurality concluded that "in a case such as" *Eastern Enterprises* itself, "it cannot be said that monetary relief against the Government is an available remedy" because "[t]he payments mandated by the Coal Act, although calculated by a Government agency, are paid to the privately operated Combined Fund," and Congress did not contemplate "that the Treasury would compensate coal operators for their liability under the Act." 524 U.S. at 521. Accordingly, the plurality reasoned, in a situation involving mandated payments by one private party to another, the "presumption of Tucker Act availability must be reversed." *Ibid.* Here, by contrast, EPACT requires domestic utility companies to pay assessments directly to the United States and petitioners seek a refund of payments from the United States.

Eastern Enterprises is also distinguishable because there, unlike here, the claims were all premised on the Due Process Clause and the Takings Clause. Here, in contrast, petitioners also contend (in multiple counts of

the complaint) that the EPACT assessments violate their contract and settlement rights with the government. Such contract matters plainly fall within the exclusive jurisdiction of the Court of Federal Claims. Indeed, it is well established that the district courts have no power under the APA to award declaratory or equitable relief on contract claims.[5]

3. Petitioners contend (Pet. 23-26) that this Court should grant review because the decision below creates a conflict among the circuits concerning the proper

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[5] See, *e.g.*, *Sharp* v. *Weinberger*, 798 F.2d 1521, 1524 (D.C. Cir. 1986) (Scalia, J.) ("We know of no case in which a court has asserted jurisdiction either to grant a declaration that the United States was in breach of its contractual obligations or to issue an injunction compelling the United States to fulfill its contractual obligations."); *Zelman* v. *Gregg*, 16 F.3d 445, 448 (1st Cir. 1994) ("equitable relief cannot be obtained on contract claims against the government"); *North Star Ala. Hous. Corp.* v. *United States*, 9 F.3d 1430 (9th Cir. 1993) (en banc) (same), cert. denied, 512 U.S. 1220 (1994); *Eagle-Picher Indus., Inc.* v. *United States*, 901 F.2d 1530, 1532 (10th Cir. 1990) (APA's waiver of sovereign immunity "does not extend to actions founded upon a contract with the United States"); *Wabash Valley Power Ass'n* v. *Rural Electrification Admin.*, 903 F.2d 445, 452 (7th Cir. 1990) (effort to obtain specific performance of promise allegedly made by an agency not within district court's jurisdiction). Petitioners' claim (Pet. 21-22) that the decision below conflicts with *In re Chateaugay*, 53 F.3d 478 (2d Cir.), cert. denied, 516 U.S. 813 (1993), and *Student Loan Marketing Ass'n* v. *Riley*, 104 F.3d 397 (D.C. Cir.), cert. denied, 522 U.S. 913 (1997), fails for the same reasons as petitioners' claim of conflict with *Eastern Enterprises*. Both of those cases address the ripeness of takings claims in light of *Williamson County*, *supra*, rather then the availability of an APA action under 5 U.S.C. 704; neither involved contract claims; and neither involved litigants that already had takings claims pending in the Court of Federal Claims when they filed suit for declaratory relief in another forum.

forum for the litigation of due process claims. That purported conflict is illusory.

In this case, the court of appeals held that petitioners' due process claims were cognizable in the Court of Federal Claims under the "illegal exaction" doctrine. Pet. App. 5a. Court of Federal Claims and Federal Circuit precedent hold that that doctrine permits plaintiffs to recover under the Tucker Act monies illegally taken by the government, even if the plaintiff cannot identify a statute mandating the return of funds. The Court of Federal Claims has observed:

> [I]t is not every claim involving or invoking the Constitution, a federal statute, or a regulation which is cognizable here. The claim must, of course, be for money. Within that sphere, the non-contractual claims we consider under Section 1491 can be divided into two somewhat overlapping classes—those in which the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum; and those demands in which money has not been paid but the plaintiff asserts that he is nevertheless entitled to a payment from the treasury. In the first group (where money or property has been paid or taken), the claim must assert that the value sued for was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation.

Eastport S.S. Corp. v. *United States*, 372 F.2d 1002, 1007 (1967).

Petitioners assert that their due process claims cannot be asserted in the Court of Federal Claims because the Due Process Clause is not a "money-mandating" cause of action. Pet. 23. Petitioners correctly recognize the *general* rule that the Court of Federal Claims lacks

jurisdiction over due process claims. That constitutional provision, unlike the Just Compensation Clause of the Fifth Amendment, does not itself mandate the payment of money in compensation for the plaintiff's loss. See *United States* v. *Testan*, 424 U.S. 392, 400 (1976); *United States* v. *Mitchell*, 463 U.S. 206, 216-217 (1983) (plaintiff generally "must demonstrate" that the "source of substantive law he relies upon can fairly be interpreted as *mandating* compensation by the Federal Government for the damage sustained") (emphasis added) (internal quotation marks omitted). See, *e.g.*, *Murray* v. *United States*, 817 F.2d 1580, 1582-1583 (Fed. Cir. 1987); *Montalvo* v. *United States*, 231 Ct. Cl. 980, 982-983 (1982). But petitioners ignore the fact that the Court of Federal Claims permits monetary recovery under the Tucker Act in the absence of a money-mandating statute or constitutional provision *if* the plaintiff can assert an "illegal exaction" claim of the sort recognized in *Eastport*. Specifically, the Court of Federal Claims permits a plaintiff to seek damages under the Tucker Act if the "value sued for was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation." *Eastport S.S. Corp.*, 372 F.2d at 1007; see, *e.g.*, *Castillo Morales* v. *United States*, 19 Cl. Ct. 342, 345 (1990); *Betz* v. *United States*, 40 Fed. Cl. 286, appeal dismissed, 155 F.3d 568 (Fed. Cir. 1998).

Thus, following *Eastport*, Tucker Act jurisdiction has been recognized if the claim arises *either* (1) under a "money-mandating" statute or constitutional provision, or (2) under a claim that the money sought by the plaintiff has been "illegally exacted" by the government from the plaintiff in contravention of a statute or constitutional provision. See *Testan*, 424 U.S. at 400-402 (noting and distinguishing the illegal exaction theory of

Eastport and explaining that, in the absence of such a claim, the jurisdiction of the Court of Federal Claims "depends upon whether any federal statute can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained"). In *Mallow* v. *United States*, 161 Ct. Cl. 446 (1963), for example, the Court of Claims held that it had jurisdiction over a suit seeking to recover an illegally exacted fine, either as a claim founded upon an Act of Congress, or as a claim founded upon the Constitution. See also *Clapp* v. *United States*, 117 F. Supp. 576 (Ct. Cl.) (upholding illegal exaction theory as basis for jurisdiction), cert. denied, 348 U.S. 834 (1954). In this case, the court of appeals merely applied that same doctrine to hold that petitioners could bring a Tucker Act suit to recover the sums that were allegedly exacted from them in violation of the Due Process Clause.

Bowing to that weight of authority, petitioners do not question whether the Court of Federal Claims has applied the illegal exaction theory to adjudicate statutory claims. Rather, petitioners assert that such jurisdiction cannot extend to *constitutional* claims, such as their due process claims. Pet. 24-25. Petitioners, however, offer no reason why the illegal exaction doctrine, as articulated by the Federal Circuit, would be limited to statutory claims. The text of the Tucker Act clearly contemplates adjudication of constitutional issues. It affords the Court of Federal Claims jurisdiction to render judgment "upon any claim against the United States founded either upon the Constitution[] or any Act of Congress." 28 U.S.C. 1491(a)(1). Petitioners offer no reason why the illegal exaction doctrine would apply differently for claims "founded * * * upon * * * any Act of Congress" than it does for claims

"founded * * * upon the Constitution" when the Tucker Act mentions both in the same clause.

Finally, petitioners' contention (Pet. 23-24) that there is a conflict in the circuits on this issue is without merit. Most of the cases cited by petitioners simply do not address the scope of the illegal exaction doctrine. For example, *Rothe Development Corp.* v. *United States Department of Defense*, 194 F.3d 622 (5th Cir. 1999) (cited at Pet. 23), nowhere holds that a plaintiff may bring a due process claim in district court notwithstanding its ability to bring a Tucker Act illegal exaction claim for precisely the same constitutional injuries. To the contrary, in that case the court held that it lacked jurisdiction over the appeal—and that the appeal had to be transferred to the Federal Circuit—because the suit sounded in quasi-contract and arose under the Tucker Act. *Id.* at 626. Moreover, in *Rothe* the plaintiff could not have brought a claim for the return of illegally exacted money in the Court of Federal Claims because the plaintiff there had not paid money to the government. Instead, the suit challenged the government's decision to award a contract opportunity to one of the plaintiff's competitors. *Id.* at 623. The remaining cases cited by petitioners are similarly distinguishable.[6] And certainly none holds that liti-

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[6] *Polanco* v. *DEA*, *supra* (cited at Pet. 23), for example, involved an allegedly defective forfeiture, and nowhere addressed whether the plaintiff could have brought a Tucker Act suit under an illegal exaction theory. Further, as explained above (p. 11 n.2, *supra*), *Polanco*'s analysis of whether the APA action was barred by sovereign immunity has been superseded by this Court's more recent decision in *Blue Fox*. Similarly, neither *Marshall Leasing, Inc.* v. *United States*, 893 F.2d 1096, 1101 (9th Cir. 1990) (cited at Pet. 24), nor *Lake Mohave Boat Owners Ass'n* v. *National Park Service*, 78 F.3d 1360, 1365 (9th Cir. 1996) (cited at Pet. 23),

gants, such as petitioners, that have *already* filed due process actions in the Court of Federal Claims—and over which the Court of Federal Claims has exercised jurisdiction under the illegal exaction doctrine—may later bring the same claims in district court under the APA.

Ultimately, the fallacy of petitioners' argument is most apparent from petitioners' own actions. Notwithstanding their assertion that substantive due process constitutional claims cannot be brought in the Court of Federal Claims, petitioners in fact have brought precisely such claims in that court seeking a refund of their payments of prior EPACT assessments. Such a willingness to undermine their own claims can only be explained by petitioners' desire to escape adverse Federal Circuit precedent, such as *Yankee Atomic*.[7] In what

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considered the illegal exaction theory, much less rejected it. And *Clark* v. *Library of Congress*, 750 F.2d 89 (D.C. Cir. 1984) (cited at Pet. 24), is even further afield. In that case, the plaintiff claimed that the government had violated his First Amendment rights by dismissing him; and he sought reinstatement to his former position. Because the plaintiff had not paid any money to the government, an illegal exaction claim—under the First Amendment or the Due Process Clause—was not a possibility.

[7] While petitioners assert (Pet. 11) that *Yankee Atomic* did not directly decide the due process and takings questions presented in their Court of Federal Claims and district court actions, *Yankee Atomic* directly decided a takings claim and disposed of the contract claims asserted by petitioners. *Yankee Atomic* thus stands as a direct roadblock to petitioners' lawsuit. Furthermore, the same constitutional claims involved in this case have been rejected on the merits by the Court of Federal Claims in five other cases brought by other nuclear utilities, including Commonwealth Edison and Carolina Power, both of whom are named plaintiffs in petitioners' district court action. See *Omaha Pub. Power Dist.* v. *United States*, 44 Fed. Cl. 383 (1999), appeal pending, No. 99-5160 (Fed. Cir. argued Nov. 2, 2000); *Maine Yankee Atomic Power Co.*

the court of appeals properly characterized as "forum-shopping," Pet. App. 24a, petitioners are plainly seeking "to circumvent the jurisdiction of the Court of Federal Claims," *id.* 13a, so as to escape adverse precedent. That sort of forum shopping should not be countenanced by the courts. See, *e.g.*, *Hanna* v. *Plumer*, 380 U.S. 460, 468 (1965).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2001

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v. *United States*, 44 Fed. Cl. 372 (1999), appeal pending, No. 99-5156 (Fed. Cir. argued Nov. 2, 2000); *Sacramento Mun. Util. Dist.* v. *United States*, 44 Fed. Cl. 395 (1999), appeal pending, No. 99-5158 (Fed. Cir. argued Nov. 2, 2000); *Commonwealth Edison Co.* v. *United States*, 46 Fed. Cl. 29 (2000), appeal pending, No. 00-5069 (Fed. Cir. argued *en banc* Oct. 3, 2001); *Carolina Power & Light Co.* v. *United States*, 48 Fed. Cl. 35 (2000), appeal pending, No. 01-5040 (Fed. Cir.).

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No. 01-205

IN THE

Supreme Court of the United States

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioners' corporate disclosure statement was set forth at page *iv* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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The Federal Circuit's decision, which has precedential effect nationwide, 28 U.S.C. § 1292(d)(4)(A), precludes any plaintiff challenging the constitutionality of a federal statute that creates ongoing financial obligations to the United States from seeking declaratory or injunctive relief in a federal district court. Rather, under the Federal Circuit decision, the only court with jurisdiction to hear such constitutional claims is the United States Court of Federal Claims ("CFC").

The Federal Circuit's decision upsets well-established jurisdictional rules. It conflicts squarely with *Eastern Enterprises Inc. v. Apfel*, 524 U.S. 498 (1998), in which this Court held that Fifth Amendment challenges to a federal revenue-generating statute should be brought in federal district court and not the CFC. It eviscerates *Bowen v. Massachusetts*, 487 U.S. 879 (1988), which reaffirmed the long-standing rule that actions asserting claims for prospective, equitable relief, as opposed to money damages, belong in the federal district court and not the CFC. In addition, the Federal Circuit's decision calls into question countless other decisions of this Court and the regional circuit courts of appeals in which similar constitutional challenges and claims for declaratory and injunctive relief were brought and decided in federal district courts, not the CFC. *See* Pet. 19-26. This Court's review is essential to restore certainty and prevent further needless litigation over the proper forum for constitutional challenges to federal revenue-generating statutes.

1. Respondents' Argument Is Factually Inaccurate.

Hard-pressed to defend the Federal Circuit's rationale, Respondents contend, in their Brief in Opposition, that the procedural background of this case justifies the Federal

Circuit's sweeping departure from controlling precedent. *See, e.g.*, Resp. Br. 2. However, even if the procedural posture of this case were relevant to the jurisdictional issues presented here — which it plainly is not — Respondents' argument fails because it is premised upon an inaccurate portrayal of the facts underlying this appeal.

Respondents contend that Petitioners' District Court action, when first commenced, was identical in all respects to the refund actions they previously brought in the CFC. This is the focus of Respondents' "Question Presented" (Resp. Br. (I)) and the thrust of their argument to the Court. *See* Resp. Br. 2 ("[t]his case concerns whether . . . petitioners, who . . . in fact have *already* sought judicial review of their claims in the [CFC], [can] bring the *same* claims . . . in district court . . ."); *id.* 4 (". . . petitioners filed this action in federal district court in New York, relying on the *same* constitutional and contractual claims they had asserted in support of their 'illegal exaction' suits in the [CFC]") (emphasis added). Respondents also insist that these procedural facts distinguish this case from *Eastern Enterprises*, *Bowen* and numerous conflicting circuit courts of appeals' precedent. *See, e.g.*, *id.* 10-11 ("none [of the conflicting precedent] involved litigants that had already brought suits for retrospective relief in the [CFC] and then . . . filed almost identical claims . . . in the district court"); *id.* 12 (arguing that *Bowen* should not apply "where, as here, the claimants were pursuing substantially the same claims [in the CFC] at the time they filed their [district court] suits"); *id.* 20-21 ("[no contrary authority] holds that litigants, such as petitioners, that have already filed due process actions in the [CFC] . . . may later bring the same claims in district court").

As Respondents well know, being a party to the District Court and CFC cases, Petitioners' Due Process and Takings Clause challenges to EPACT were *first* asserted in the District Court, *not* the CFC. Respondents entirely ignore the fact that Petitioners' CFC cases, when initially brought, were limited to breach of contract and just compensation claims and did not include "illegal exaction" or due process causes of action at all.[1] It was not until *after* this Court's decision in *Eastern Enterprises* and *after* commencement of the District Court action, that most (but not all) Petitioners amended their CFC complaints to include illegal exaction due process claims. Moreover, as Petitioners' CFC complaints clearly indicate, these amendments were made solely for the purpose of preserving Petitioners' right to refunds based on the constitutional theories being advanced in the District Court.[2] Respondent's suggestion, thus, that Petitioners' District Court action, when commenced, was nothing more than a carbon copy of Petitioners' then-pending CFC cases is seriously misleading.

In any event, the procedural background of this case has no bearing on the jurisdictional question presented here. *See* 28 U.S.C. §§ 1331, 1631; 5 U.S.C. § 702, *et seq.* Contrary to Respondents' assertion, neither *Eastern Enterprises* nor *Bowen* turns on the absence of an action in the CFC, and

1. Although some of Petitioners' CFC actions initially included a cause of action labeled "illegal exaction," those claims addressed EPACT's application to indirect purchasers of Respondents' uranium enrichment services and did not involve any constitutional challenge to the EPACT assessment scheme.

2. Respondents also conveniently ignore the fact that Petitioners sought to stay their CFC actions pending resolution of the District Court case, and that, with one exception, each of those actions is presently stayed. Pet. 4-5.

there is nothing in either decision to suggest that the presence of such a case would have led this Court to a different result.[3]

Moreover, the course of action Petitioners pursued — which was to file actions for refunds of past payments in the CFC and then to bring a separate action in the District Court challenging the validity of EPACT and seeking prospective, equitable relief from future payments — was entirely consistent with prevailing Federal Circuit precedent. *See Creppel v. United States*, 41 F.3d 627 (Fed. Cir. 1994); *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545 (Fed. Cir. 1994). As these cases teach, such an approach does not constitute forum-shopping, but is likely necessary to attain complete relief in light of the jurisdictional limitations of the two federal courts.[4] Respondents fail to explain why the Federal Circuit's rule does not apply with equal force here.[5]

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3. Respondents' suggestion that *Bowen* is also distinguishable because the CFC's jurisdiction in that case was uncertain, whereas here, it is entirely clear, simply does not bear scrutiny. In *Bowen*, the CFC's jurisdiction was doubtful because it could not provide the equitable relief sought. Here, it is undisputed that the CFC lacks jurisdiction to provide declaratory and injunctive relief and, contrary to Respondents' assertion, the CFC's power to render judgment on Petitioners' Due Process Clause claims is far from clear. *See infra* at 6; Pet. 19-26.

4. Indeed, as 5 U.S.C. § 706 makes clear, if there is any court capable of providing Petitioners with complete relief, it is the federal district court.

5. The Federal Circuit adopted this rule in *Loveladies Harbor* following this Court's decision in *Keene Corp. v. United States*, 508 U.S. 200 (1993). In *Keene*, this Court considered 28 U.S.C. § 1500, which precludes a plaintiff that first brings an action in the district court from later pursuing a claim in the CFC. Notably, the statute does not prohibit the reverse — first bringing an action in the CFC

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2. APA Section 704 Is Inapplicable Here.

The Federal Circuit also reaches the remarkable conclusion it does here by completely distorting the letter and intent of Administrative Procedure Act ("APA") Section 704 (5 U.S.C. § 704).[6] Under the Court's novel and expansive reading of that statute, the standard for assessing whether the CFC (or any other court) can provide an "adequate remedy" and deprive the District Court of jurisdiction, has little to do with the remedy requested at all. Rather, as Respondents' submit, the question is whether or not the CFC can provide "adequate review." Resp. Br. 9-11. Under Respondents' approach, so long as the CFC has the power to hear the substantive issues raised it can provide an "adequate remedy." Respondents' strained reading of the statute lacks merit and their reliance on *Bowen* for this point is equally misplaced.[7]

(Cont'd)
and then commencing a separate action in the district court — the procedure adopted by Petitioners here. Moreover, although this Court in *Keene* did not directly rule upon the merits of Petitioners' approach, it did acknowledge the process. 508 U.S. at 209-16 n.4, 6, 9.

6. Respondents suggest that Petitioners believe a waiver of sovereign immunity under the APA is required for their constitutional challenges to EPACT. Resp. Br. 9. Respondents well know that Petitioners do not believe such a waiver is necessary as they have maintained in the courts below and in their petition here. *See* Pet. 17-18. As this Court's decision in *Eastern Enterprises* makes clear, the APA's waiver of sovereign immunity is not required where, as here, the constitutionality of government action is at issue. *See also United States v. Vasquez*, 145 F.3d 74 (2d Cir. 1998). Even if, however, an explicit waiver of sovereign immunity were required in this case, the APA surely provides one.

7. Respondents' quotes from *Bowen* on this point, Resp. Br. 2, 9-10, are completely out of context. As this Court in *Bowen* explained,
(Cont'd)

The Federal Circuit compounds its misreading of Section 704 by concluding that Petitioners' claims for prospective relief can be satisfied by application of the doctrine of *res judicata*. As Respondents, echoing the Federal Circuit, contend, if a CFC judgment awarding refunds in one action might have preclusive effect in a subsequent refund action, the CFC can provide an adequate remedy for injunctive relief. Resp. Br. 10. Thus, under the Federal Circuit's decision, Petitioners must continue to pay their yearly EPACT assessments and then sue Respondents each year for refunds. The only relief Petitioners might possibly get from this seemingly useless exercise depends entirely upon Respondents' willingness to refrain voluntarily from collecting future assessments. APA Section 704 does not dictate such an absurd result.[8]

(Cont'd)
the types of actions in which the Tucker Act typically provides an adequate remedy are those arising under federal statutes "that provide compensation for specific instances of past injuries or labors . . . [not] suits that [might] require the type of injunctive and declaratory powers that the districts courts can bring to bear . . .". *Bowen*, 487 U.S. at 900 n.31. *See also Bowen*, 487 U.S. at 904 ("litigation in the Claims Court can offer precisely the kind of 'special and adequate review procedures' that are needed *to remedy particular categories of past injuries or labors for which various federal statutes provide compensation*") (emphasis added). As *Bowen* makes clear, the Tucker Act is not such a statute.

8. Respondents' further argument that the CFC can provide an "adequate remedy" because Petitioners would not be entitled to an injunction is also irrelevant. A plaintiff's likelihood of success on the merits has never been the standard for judicial review under the APA, or the barometer by which a federal district court's jurisdiction is measured. *See also Bowen*, 487 U.S. at 907 n.43 ("[i]t is important
(Cont'd)

3. *Eastport*'s Dicta Is Inconsistent With This Court's Precedent.

Respondents dispute Petitioners' assertion that the CFC lacks jurisdiction to hear their due process challenges to EPACT by pointing to the language of the Tucker Act which gives that court power "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress . . .". 28 U.S.C. § 1491(a)(1). Resp. Br. 19-20. Respondents overlook, however, the clear admonition of this Court that no action against the United States may be maintained under the Tucker Act, unless the Constitutional provision, statute or regulation at issue "creates a substantive right enforceable against the United States for money damages." *United States v. Testan*, 424 U.S. 392, 398 (1976). Respondents here concede that the Due Process Clause does not create a substantive right to money damages, Resp. Br. 17-18, yet suggest that such a right can be derived from *dicta* in a 33-year old Court of Claims case. Resp. Br. 16-17, citing *Eastport S.S. Corp. v. United States*, 372 F.2d 1002 (Ct. Cl. 1967). However, if, as Respondents and the Federal Circuit assert, the CFC has "long possessed jurisdiction to consider constitutional claims . . . under the 'illegal exaction' doctrine," Pet. App. 10a, it is quite remarkable that neither can point to a decision in which

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to remember that whether injunctive or declaratory relief is appropriate in a given case will not always be apparent at the outset"). Respondents' related contention that the District Court has already opined on the merits of Petitioners' injunction claims is particularly disingenuous. Resp. Br. at 14. Not only is the District Court's statement pure *dictum*, taken entirely out of context, but it was later rejected by the Second Circuit Court of Appeals. *See Consolidated Edison Co. of New York v. United States*, 213 F.3d 625 (2d Cir. 2000).

the court has exercised that power outside of recent cases involving EPACT.[9]

CONCLUSION

For the reasons set forth above and in their original petition, Petitioners respectfully request that their petition for a writ of certiorari be granted.

Respectfully submitted,

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9. Even if, as a general matter, the CFC were empowered to hear due process claims that still would not be determinative here. As set forth above, the focus of Section 704 is on the adequacy of the remedy, not the substantive legal issues to be reviewed.